(30,562)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 597

BENJAMIN W. MORSE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] **IN UNITED STATES DISTRICT COURT**

PETITION FOR WRIT OF HABEAS CORPUS—Filed Feb. 6, 1923

To the Honorable the District Court of the United States in and for the Southern District of New York:

The petition of Benjamin W. Morse, respectfully shows that he is a resident of Boston, State of Massachusetts, and is now actually imprisoned and restrained of his liberty and detained by power of the authority of the United States in the custody of the United States Marshal for the above named district by reason of the fact and circumstances, and not otherwise. Except as is hereinafter stated, your petitioner is not committed or detained by virtue of any process or mandate issued by any Court of the United States, or by any Judge thereof; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree or final order. The cause or pretense of the imprisonment or restraint, according to the best of the knowledge and belief of your Petitioner, is that Petitioner was arrested, apprehended and taken into custody in the Southern District of New York, on February 6, 1923, by said Marshal by virtue of an alleged warrant issued out of the above named court based upon an alleged indictment against your Petitioner and others said to have been found by the Grand Jury in said Court in the Southern District of New York on April 27, [fol. 2] 1922; your Petitioner further states, upon information and belief, that said indictment is invalid and does not state a crime, and does not state facts sufficient to constitute a crime, as therein alleged, and that the validity of said indictment has been passed upon by the United States District Court for the District of Connecticut, in the case of United States against Harry F. Morse, and that it was held and decided by said court that said indictment was invalid and it was so declared by order of said court. A copy of said order and the opinion filed therewith is attached hereto marked Exhibit "A" and made a part hereof.

Wherefore your Petition- prays that a writ of habeas corpus issue directed to the said Marshal commanding him to produce Petitioner before this Honorable Court, together with the true cause of the detention of Petitioner to the end that inquiry may be had in the premises; and Petitioner respectfully requests that he may be permitted on the hearing of said writ to submit such further affidavits and documents as he may be advised in support of his said application and that pending the hearing and determination upon said writ that Petitioner be admitted to bail under said writ in such reasonable amount as to the Court may seem proper.

Dated, the 6th day of February, 1923.

Benjamin W. Morse. Nash Rockwood, Charles Tressler Lark, Attorneys for Petitioner.

Office and Post Office Address, 527 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 3] Jurat showing the foregoing was duly sworn to by Benjamin W. Morse, omitted in printing.

[File endorsement omitted.]

[fols. 4 & 5] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Writ of Habeas Corpus Requiring the United States Marshal to Produce the Body of BENJAMIN W. MORSE

RETURN TO WRIT OF HABEAS CORPUS—Filed March 10, 1923

William C. Hecht, United States Marshal for the Southern District of New York, respectfully makes the following return to the writ of habeas corpus herein:

First. Respondent alleges that the petition for the writ of habeas corpus herein is insufficient in that it does not state any facts sufficient to authorize the issuance of such writ.

Second. The grand jurors of the United States of America for the Southern District of New York did present to the United States District Court for the said District an indictment against the same Benjamin W. Morse and others and the said indictment was duly filed in this Court on April 27, 1922.

Third. That thereafter, to wit, on May 10, 1922, a bench warrant was issued out of this Court upon the said indictment for the apprehension of the said defendants.

Fourth. That the defendant Benjamin W. Morse was taken into custody in the Southern District of New York in pursuance of said aforesaid bench warrant and was detained by me under authority thereto.

[fols. 6 & 7] Fifth. On information and belief, thereafter on February 6, 1923, the defendant was duly arraigned before the United States District Court in the said Southern District of New York and a plea of not guilty was entered to the aforesaid indictment and bail in the sum of $15,000 was fixed pending trial upon the said indictment, which bail was not furnished by the said Benjamin W. Morse.

Wherefore, your respondent prays that the writ of habeas corpus herein may be dismissed and that the said Benjamin W. Morse be remanded to the custody of the United States Marshal for the Southern District of New York to be dealt with according to law.

William C. Hecht.

Jurat showing the foregoing was duly sworn to by William C. Hect, omitted in printing.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BENJAMIN W. MORSE—Filed June 19, 1924

STATE OF NEW YORK,
County of New York, ss:

Benjamin W. Morse, being duly sworn, says:

I submit the following affidavit in support of my application by writ of habeas corpus, verified February 6th, 1923, and to vacate and set aside my said arrest, and as a traverse and reply to the "return to writ of habeas corpus," filed herein on the 17th day of February, 1923, by William C. Hecht, United States Marshal for the Southern District of New York, and in accordance with the provisions of the revised statutes of the United States, I suggest to the Court the facts herein contained in addition to the averments in my petition for said writ of habeas corpus, in support of my contention that my arrest and detention by the United States Marshal for the Southern District of New York, as set forth in said writ of habeas corpus, was wholly illegal, unauthorized, without warrant of law, a violation of my constitutional rights, and that I was arrested and detained without jurisdiction or proper authority.

[fol. 9] In January, 1922, two indictments were returned against me, in connection with others, by a Grand Jury in the District of Columbia. The first indictment, known as Criminal Indictment No. 38753, was returned by a Grand Jury in the Supreme Court of the District of Columbia and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard O. White and Colin H. Livingstone." In said indictment I am charged, in connection with said other defendants, with having committed the crime of conspiracy to defraud the United States and to commit an offense against the United States by defrauding the United States Shipping Board Emergency Fleet Corporation, as provided by Section 37 of the Federal Code. The second of said indictments is known as Criminal No. 39033, and was returned by a Grand Jury in the Supreme Court of the District of Columbia in January, 1922, and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard

O. White and Colin H. Livingstone." I am charged in connection with said other defendants in said indictment, with having committed the crime of conspiracy to defraud the United States, as pro-
[fol. 10] vided by Section 37 of the said Federal Penal Code. I was arraigned upon both of said indictments, pleaded not guilty to each thereof, and was admitted to bail on each indictment in the sum of $10,000. I furnished bonds in said amounts, with George Ray, a resident of Washington, D. C. as my surety. My said bonds were duly approved by the Court and I was ordered by the Court to be released from the custody of the Marshal and was thereupon placed in the legal custody of my bondsman. Said bonds have at all times been in full force and effect since said time, and were in full force and effect at the time of my arrest herein in the Southern District of New York, on the 6th day of February, 1923, and I was at said time and am now in the legal custody of my said bondsman in said Washington, criminal cases.

Said criminal cases in the District of Columbia were at issue and had been peremptorily set for trial in the Supreme Court in said District of Columbia, by Justice Wendell P. Stafford, for 10:30 A. M. of February 6th, 1923, and all defendants were directed by the Court to appear at said time for trial.

I reside at Boston, Mass., and in order to attend said trial at Washington on February 6th, 1923, I left Boston on February 5th, 1923, by the Federal Express of the New York, New Haven & Hartford Railroad Company, which was the usual and shortest and most direct railroad route to Washington, D. C. As I was en route to Washington on said train and asleep in my berth thereon, I was forceably seized by the United States Marshal at New York City, as said Federal Express passed through New York City, and was forceably taken from the train at the Pennsylvania Station, and subjected to said
[fol. 11] arrest by said Marshal, from which I seek to be discharged herein upon the ground that the same was and is wholly illegal, unauthorized, and in violation of my constitutional rights. I inquired of the representatives of said Marshal at the time of my said arrest by what authority I was taken into custody, and he thereupon exhibited to me a bench warrant issued upon an indictment found against me in April, 1922, in the Southern District of New York, which is hereafter referred to, which said bench warrant was dated July, 1922. I was taken by said Marshal and his assistants from said train to the Federal Building in New York City, notwithstanding the fact that I explained in detail and at length to the said Marshal and his assistants that I was on my way to attend the trial of my criminal cases at Washington on the morning of February 6th, 1923, in Justice Stafford's court. I requested permission to telephone to my counsel, Nash Rockwood, who was at the Willard Hotel, at Washington, D. C., awaiting the calling of my said case on the morning of February 6th, and was refused permission to do so by said Marshal and his assistants, and I was told that I could not communicate with my said counsel. I was detained against my will in the office of the Marshal in the Federal Building, on said day, from about two o'clock in the morning of February 6th

until I was thereafter and during the afternoon of February 6th released by order of United States Judge Winslow, upon my application for a habeas corpus, and upon my furnishing bail approved by the Court in the sum of $15,000. By reason of said arrest and de-
[fols. 12 & 13] tention I was wholly unable to proceed with my journey to Washington, and when my case was called before Justice Stafford on the morning of February 6th, at 10:30 A. M., I was unable to be present in court.

In April, 1922, I was also indicted by a Grand Jury in the Southern District of New York, charged with having committed the crime of conspiracy to defraud the United States and to violate Section 37 of the Penal Code, and Section 215 of the Penal Code by using the mails to defraud, in the matter of the sale of stock of the United States Steamship Company. A bench warrant was issued upon said indictment, which was the same bench warrant upon which I was arrested on February 6th, 1923, as hereinbefore detailed. Said bench warrant was sent to the United States Attorney in the State of Massachusetts, and proceedings under the United States Revised Statutes to remove me from my place of residence in the State of Massachusetts to the Southern District of New York
[fol. 14] were instituted by the United States in Massachusetts in July, 1922, before U. S. Commissioner Hayes, 2nd. Such proceedings were then had that after a full hearing including the taking of extended testimony and the introduction of much documentary evidence and the submission of briefs upon the law and facts, I was discharged by the Commissioner on February 8th, 1923, who declined to commit me for removal to the Southern District of New York. The opinion of said Commissioner Hayes was as follows:

UNITED STATES OF AMERICA,
District of Massachusetts:

UNITED STATES OF AMERICA

vs.

BENJAMIN W. MORSE

This is to certify that I, William A. Hayes, 2nd, United States Commissioner for the District of Massachusetts, have on this 8th day of February, 1923, found that the evidence submitted by the defendant is sufficient to overcome the presumption of the Indictment, and that I have, therefore, discharged the defendant.

(Signed) William A. Hayes, 2nd, United States Commissioner. (Seal.)

My bond was thereupon discharged and exonerated and I continued in the custody of my Washington bondsman. My brother Harry F. Morse, was also arrested in Connecticut in removal proceedings upon the same indictment and such proceedings were there had that he was held by the Commissioner for removal to the Southern Dis-

trict of New York, and was committed to the Marshal pending application for a warrant of removal to the United States Judge of the District. He immediately applied by writ of habeas corpus and certiorari for his discharge, and the United States, at the same time, applied to Hon. Edwin S. Thomas, United States Judge, for a warrant for his removal. Pending the decison of said application he [fol. 15] was released upon bail, and during all of said times my bail in the District of Columbia was, as aforesaid, in full force and effect.

Said proceedings upon the application of the Government for my brother's removal to the Southern District of New York and his application for a discharge upon writ of habeas corpus and certiorari were consolidated and heard together, and after a full consideration of both applications, and on January 25th, 1923, Judge Edwin S. Thomas, United States Judge for the District of Connecticut, granted his application for discharge upon writ of habeas corpus, and denied the Government's application to remove him to the Southern District of New York. Judge Thomas at said time had full jurisdiction of the subject matter and of his person under the provisions of Section 1014 of the Revised Statutes of the United States. I annex hereto and make a part of this affidavit, the same as if herein written at length, a copy of the opinion of Judge Thomas granting the said discharge of my said brother, Harry F. Morse, and denying the right of the United States to remove *me* to the Southern District of New York. The order of Judge Thomas so discharging him and denying the right of the United States to remove him to the Southern District of New York had not been appealed from by the United States at the time of my said arrest on February 6th, 1923.

In the argument of the United States Attorney and of my brother's counsel before Judge Thomas, the United States Attornew urged that [fol. 16] the indictment charged the commission of a criminal offense under the Federal Laws, and was legally sufficient as an indictment, and was prima facie evidence of probable cause. The question of the legal sufficiency of the indictment was therefore squarely and directly before Judge Thomas for decision, and was submitted to him both by the Government and by my brother's counsel. Judge Thomas held, in his opinion which is submitted herewith, that the said indictment in the Southern District of New York, upon which I have now been arrested in New York as hereinbefore detailed, did not charge the commission of a criminal offense against the laws of the United States and that upon the facts of the case as shown before the Commissioner probable cause to believe me guilty of a criminal offense against the United States was not made out by the Government.

At the time of my arrest in the Southern District of New York, the proceedings in Connecticut before United States Judge Thomas had fully terminated, and my brother had been and was discharged from the custody of the United States in Connecticut, and his bond in said proceedings in Connecticut was fully exonerated and it had been determined that the United States was without legal right or authority to remove him to the Southern District of New York for trial

upon the illegal indictment aforesad. On the 6th day of February, 1923, when I was arrested herein, as aforesaid, I was in the legal custody of my bondsman upon the indictments found in the Washington jurisdiction, and was also in the custody of my bondsman in the Massachusetts District as I had also been required to and had given bond there in said removal proceedings pending before Commissioner Hayes.

The United States of America was the complainant against me both in the New York and the Washington jurisdiction.

[fol. 17] The consent of the Court in Washington, nor the consent of Judge Wendell P. Stafford, before whom my trial was set for February 6th, as aforesaid, was not asked or obtained for my arrest and detention in New York, or for my removal to the Southern District of New York.

I submit to this honorable Court that my arrest in the Southern District of New York was a violation of my constitutional rights under [fol. 18] the due process clause of the Constitution of the United States, and an illegal deprivation of my liberty, for the reason, among others, that the same operated to prevent my attendance in Washington on February 6th, 1923, when my criminal cases were actually set for trial, thereby rendering liable to forfeiture the bond which I had given in the Washington jurisdiction.

I further submit that inasmuch as my brother, Harry F. Morse, had been discharged by United States Judge Thomas in the District of Connecticut in proceedings wherein said Judge had jurisdiction both of his person and of the subject matter, said decision was final and conclusive upon the United States until reversed upon appeal.

I further submit that the indictment found against me in the Southern District of New York was and is wholly illegal and does not charge an offense under Federal Statutes, and did not warrant my arrest or detention, as aforesaid, and that there was an entire absence of weight or jurisdiction thereunder to authorize the restraint of my personal or the deprivation of my liberty.

I further claim and submit that the said indictment so returned against me was illegally found, for the reason that there was improperly and illegally present before the Grand Jury which returned said indictment an unauthorized person, to-wit, one Fletcher Dobyns, who appeared before the Grand Jury pursuant to an apparent authority given to him by Hon. Harry M. Daugherty, Attorney General of the United States, purporting to appoint said Dobyns as a special assistant to the Attorney General, with authority to appear before the [fol. 19] said Grand Jury. The letters so appointing the said Dobyns are filed with the Clerk of this Court, and are as follows:

"CBS-VHB. November 21, 1921.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, Washington, D. C.

SIR: In connection with the investigation and prosecution of alleged violations of sections 35, 37, 47, 46, and 48 of the Criminal Code of the United States, Section 41 of the Act of September, 1916,

as amended by the Act of July 15, 1918, and of other provisions of law in the District of Columbia, the Eastern District of Virginia, the Eastern District of Pennsylvania, the Southern District of New York, the Districts of Maryland, Connecticut and Massachusetts, and other judicial districts, by certain corporations, to-wit:

The Virginia Shipbuilding Corporation,
The Groton Iron Works,
The United States Steamship Company,
The Binghamton Steamship Company,
The Huron Steamship Company,
The St. Paul Steamship Company,
United States Ship Corporation,
Steamship Operating Company,
Hudson Navigation Company,
United States Transport Company,
Minneapolis Steamship Company,
C. W. Morse & Company,
Travellers Steamship Company,
Traders Steamship Company,
Transfer Steamship Company, and
United States Transport, Import and Export Company,

and by individuals acting in behalf of said corporations as officers, directors, employees, agents and attorneys, in connection with the construction of shipyards and their appurtenances in certain of said districts, the construction of ships for, and the operation thereof by, the United States Shipping Board Emergency Fleet Corporation, and the presentation of claims to the same, and to the United States, growing out of such transactions, you are hereby appointed a Special Assistant Attorney General and are authorized and directed, as such Special Assistant to the Attorney General, to conduct, in any of said districts, and in any other district, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

[fol. 20] You are to receive no compensation other than that received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) H. M. Daugherty, Attorney General."

"CBS. April 1, 1922.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, E. F. C., 45 Broadway (Room 521), New York City.

SIR: In connection with the investigation and prosecution of alleged violations of Section 37, 215 and 216 of the Criminal Code of the United States and of other provisions of law, in the Southern District of New York, and in other judicial districts by the following named persons, to-wit:

Charles W. Morse, Erwin A. Morse, B. W. Morse, Harry F. Morse, B. Murray, George M. Burditt, R. M. Much, Nehemiah Campbell,

R. O. White, Martin J. Gillen, Stuart Gibboney, William A. Barber, James A. Lynch, Mark L. Gilbert, G. S. Foster, H. E. Boughton, W. Sheridan Kane, William Dennis, James O'Brian, Jams B. Nelson, Arthur Kohler, Lawrence Bremer, Maurice O. Purdy, Arthur Braun, Edward Lucas, Harvey A. Willis, A. U. Rodney, J. D. Sugarman, Frank Epps, E. M. Fuller, L. L. Winkelman, Frank Batman, E. H. McHenry, A. J. Krebs, Jr., Samuel D. Disbrowk, George J. Strong, Dexter Rood, Jr., William Guggenheimer, B. C. Higley, by persons doing business under the firm names of Slattery & Co., Jones & Baker and Schmidt & Baery, and by other persons concerned in the conduct of the business and the sale of the capital stock of the following named concerns, to-wit:

United States Steamship Company,
Frederik Steamship Company,
Bedford Steamship Company,
Newport Steamship Company,
Northland Steamship Company,
Owego Steamship Company,
Chemung Steamship Company,
J. G. McCullough Steamship Company,
Lansing Steamship Company,
[fol. 21] Wm. Castle Rhodes Steamship Company,
Fong Suey Steamship Company,
Binghamton Steamship Company,
Minnesota Steamship Company,
Huron Steamship Company,
St. Paul Steamship Company,
Steamship Operating Company,
United States Transport, Import and Export Company,
United States Transport Company, Inc.,
Hudson Navigation Company,
Groton Iron Works,
Virginia Shipbuilding Corporation, formerly American Shipbuilding Corporation,
United States Ship Corporation,
United States Steamship Company of Delaware (proposed),
C. W. Morse & Company, Incorporated,
Robert Palmer & Sons Shipbuilding & Marine Railway Co.,
Woodlaw Corporation of Saratoga (Morse Park, Inc.),
General Realty Co.,
New York-Knickerbocker Real Estate Co.,
New York, Albany & Troy Transportation Co.,
Albany River Trust Co.,
Morse Securities Co.,
New York & Buffalo Steamship Co.,
New York, Norfolk & Washington Steamship Co.,
Gunston Hall Steamship Co.,
Betsey Bell Steamship Company,
Venada Steamship Co.,
H. F. Morse Steamship Co.,

E. A. Morse Steamship Co.,
Clemens C. Morse Steamship Co.,
Jennie R. Morse Steamship Co.,
Anna E. Morse Steamship Co.,
Colin H. Livingston Steamship Co.,
Georgie M. Morse Steamship Co.,
Follard Steamship Co.,
Nameang Steamship Co.,
Worcester Steamship Co.,
Quinnipine Steamship Co.,
Merry Mount Steamship Co.,
Hartford Steamship Co.,
Honnedaga Steamship Co.,
Provincetown Steamship Co., and
Hopatcong Steamship Co.;

You are hereby authorized and directed as Special Assistant to the Attorney General, to conduct, in any of the said districts, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

You are to serve without compensation other than received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) Guy D. Goff, Acting Attorney General."

[fol. 22] At the date of said letter the said Dobyns was and ever since has been Special Counsel of the United States Shipping Board and United States Shipping Board Emergency Fleet Corporation (hereinafter called the Fleet Corporation). Said Fleet Corporation is a private business corporation organized and existing under the laws of the District of Columbia. At the date of said letter he was not and never since has been an officer of the Department of Justice. At the date of said letter the said Dobyns was not and never has since been compensated or agreed to be compensated by the Department of Justice or from any appropriation made for the Department of Justice or any subdivision thereof or for expenditure under the direction of the Attorney General of the United States in the conduct of his duties as head or in the conduct of the work of the Department of Justice. For his services in conducting said proceedings before the grand jury which resulted in the indictment herein, the said Dobyns was to be compensated and theretofore was agreed to be compensated, as I am informed and believe, exclusively out of funds of the Shipping Board and Fleet Corporation; and I am informed and believe that prior to the date of said letter said Dobyns was acting, and ever since July 29, 1921, up to a comparatively recent time he has acted exclusively under the authority, direction and control of the Fleet Corporation or of the United States Shipping Board (hereinafter in this affidavit called the "Shipping Board") and not under the control or direction of the Attorney General;

[fol. 23] Fletcher Dobyns, Esq., is and over since on or about July 29, 1921, has been one of the Attorneys for the Shipping Board and Fleet Corporation. He is not now and never during that period has been an officer of the Department of Justice. Upon information and belief he is and during all of said period has been compensated for his services by the Shipping Board and Fleet Corporation. He is not and has not been or agreed to be compensated by the Department of Justice or any subdivision there. There is no provision of law under which Mr. Dobyns is or was authorized to be appointed specially or otherwise without compensation or while an attorney of the Fleet Corporation to conduct grand jury trials. Section 3 of the Merchants Marine Act of 1920 does not authorize an attorney employed pursuant thereto to conduct such proceedings. The pretended appointment or designation of Mr. Dobyns by the Attorney-General of the United States, of which a copy is set forth herein, was not in pursuance of or in compliance with the Act of Congress of July 30, 1906 (34 United States Statutes at large, page 816). I am informed and believe that neither his said so-called letter of appointment by the Department of Justice, nor a certified copy thereof, nor any oath thereunder, nor his appointment or employment as an attorney of the Shipping Board or Fleet Corporation, nor a certified copy thereof, nor any oath thereunder, has been filed in this Court. Mr. Dobyns was in charge of the grand jury proceedings which resulted in the indictment in the Southern District of New York. He appeared before such grand jury, not as a witness, but in control of and during the presentation to the grand jury of the evi-[fol. 24] dence on which the indictment herein was found. He is not nor during any of the times herein mentioned has he been United States attorney or a member of the staff of the United States Attorney for the Southern District of New York.

The proceedings before, and the submission of evidence to, the grand jury which resulted in and on which the indictment herein is based were, at the instance of and solely under the direction and control of the Fleet Corporation, or the Shipping Board; such proceedings were not, as required by law, conducted by, or under the control of the United States Attorney for the Southern District of New York or any member of his staff, and were not conducted by any attorney or counsellor authorized or appointed, therefore, under any provision of law, nor were they specifically directed by the Attorney General of the United States.

In a motion heretofore filed in the Southern District of New York by defendants jointly indicted with deponent, seeking to set aside and quash the said indictment because the said Fletcher Dobyns appeared before the grand jury in the Southern District of New York, the said Fletcher Dobyns filed his affidavit dated May 18, 1922, in the course of which said Fletcher Dobyns deposed as follows:

"Southern District of New York, ss:

Fletcher Dobyns, being first duly sworn, on his oath, deposes and says on or about the 29th day of July, 1921, I was appointed Special

Counsel for the United States Shipping Board Emergency Fleet Corporation to investigate the transactions on Charles W. Morse and his associates with said Fleet Corporation. As a result of an exhaustive investigation, I reached the conclusion, that Mr. Morse and his associates have been guilty of violating certain sections of the Criminal Code of the United States and laid the matter before the Attorney General of the United States. Thereupon the Attorney General requested me to present the evidence which I had obtained to a grand jury, or grand juries, as the circumstances might require. He then addressed to me the following letter (setting out letter of November [fol. 25] 21, 1921 purporting to appoint the said Fletcher Dobyns as Special Assistant to the Attorney General). On the 29th day of November, 1921, I executed and filed in the Department of Justice the following oath:

'I, Fletcher Dobyns, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of Special Assistant to the Attorney General of the United States on which I am about to enter, so help me God.'

(Signed) Fletcher Dobyns.

'Subscribed and sworn to before me this 29th day of November, A. D., 1921. J. Pierson Jones, Notary Public.' (Seal.)

* * * * * * *

"During the investigation and presentation of this case to the grand jury I have received instructions and advice from the Attorney General and his assistants and have not received instructions or advice from the Fleet Corporation or from anyone else.

I did not learn until February 7th, 1923 that the statements so made by Mr. Dobyns as to the sources and extent of his authority to appear before said grand jury in New York and the grand jury in the District of Columbia, resulting in indictments against me in both jurisdictions, was fully disputed by the Hon. Harry M. Daugherty, Attorney General of the United States. There has just been brought to my attention, and I have just obtained a printed book issued by the Government Printing Office, Washington, D. C., entitled, "Charges of Hon. Oscar E. Keller against the Attorney General of the United States" and containing at length in 573 printed pages the hearings before the Committee on the Judiciary in the House of Representatives, extending from November 16, 1922, and concluding on December 21, 1922, in the matter of the charges of the said Keller against the said Attorney General.

Specification No. 9 of the said charges against the said Attorney General printed at length on page 58 of the said printed book spe- [fol. 26] cifically charges that the said Harry M. Daugherty, as Attorney General of the United States:

"Did prostitute his high office for purpose of personal vengeance seeking and obtaining an indictment of the said Morse and of his sons as directors of the Virginia Shipbuilding Corporation on a charge of having violated the Federal Statutes; that at the same time the said Harry M. Daugherty obtained the indictment of three attorneys said to have advised the company in connection with the alleged illegal acts but failed, neglected and refused to seek indictments of other directors of the company equally guilty of the alleged violation of the Federal Statute, if any, and also failed to seek the indictment of another attorney—equally guilty with the 'attorneys indic-ted, the said principal attorney being holder of a position of great responsibility and trust in the office of the Attorney General."

The answer of the Attorney General to this specification was as follows (p. 59 of the printed book):

"The Attorney General begs leave to inform your Honorable Committee that the connection of the Department of Justice with the so-called Morse indictment was wholly formal and in proof thereof alleges and states to your Committee as follows:

That the facts and circumstances justifying the return of the indictment in question arose out of certain transactions which Mr. Morse and his co-defendants had with the United States Shipping Board subsequent to the entry of the United States into the World War; that the United States Shipping Board had and maintained its own legal department, and as such, investigated the facts giving rise to such indictments; that while it is true that certain of the attorneys representing the United States Shipping Board bore the title of Special Assistant to the Attorney General without pay they were at no time subject to the direction and control of the Department of Justice, and, in fact, were never directed or controlled by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs. The Attorney General did not direct that any person, a director or otherwise, should, or should not, be indicted, but left that matter to the officials in charge of the investigation."

In the same printed book, at p. 547 thereof, appears the testimony of Colonel Guy D. Goff, who was the Acting Attorney General who signed an order of appointment of Fletcher Dobyns as Special Assist- [fol. 27] ant to the *to the* Attorney General, dated April 21, 1922, subsequent to the finding of the indictments in the jurisdiction of the District of Columbia, hereinbefore referred to. Colonel Goff testified, among other things, as follows:

"Mr. Howland: Mr. Goff, may I ask your attention to specification No. 9, on page 46 of the facts?

Mr. Classon: What is that?

Mr. Howland: I say specification No. 9 in the committee proof, page 46, and in the hearings——

Mr. Classon: Well, we don't care about that; we have the committee print.

Mr. Goff: It is on page 47.

Mr. Howland: Yes, in the committee print page 47. That refers to the Virginia Shipbuilding Corporation and the charge attempted to be made is that a certain man by the name of Morse was indicted because of some previous relation which he sustained with the Attorney General of the United States. What is the situation in reference to that so-called Morse indictment, Mr. Goff, as you are informed on the subject?

Mr. Goff: The so-called Morse indictment grew out of certain transactions which Mr. Morse had with the United States Shipping Board Emergency Fleet Corporation. These transactions were reported to the Department of Justice by the legal department of the United States Shipping Board for such action as the Department of Justice might conclude was warranted in the premises. In due course the papers were sent to the District Attorney whose district had jurisdiction. This case was sent to the United States Attorney for the District of Columbia. I was present on two several occasions when the Attorney General stated to the general counsel of the United States Shipping Board that the Department of Justice did not care to have anything to do with this prosecution and that inasmuch as the United States Shipping Board had a very large and experienced staff of lawyers that the Attorney General, would prefer that all matters connected with the Virginia Shipbuilding Corporation, one of Mr. Morse's corporations, and with Mr. Morse, his sons, and others, be conducted solely by the legal staff of the United States Shipping Board in conjunction with Major Peyton Gordon, the United States District Attorney for the District of Columbia. That was so understood, and to my knowledge, so far as my knowledge goes, the Attorney General gave no directions to these attorneys as to what they should do.

[fol. 28] Mr. Morse at one time during the absence of the Attorney General in the West on official business went abroad and the Department of Justice was requested to use its good offices with the State Department to have Mr. Morse intercepted and asked to return to this country. I, personally, took the matter up with the State Department in conjunction with Mr. Schlessinger, the general counsel of the United States Shipping Board. The Attorney General himself personally knew nothing of these proceedings and, in fact, was not in the District of Columbia at the time they occurred. As a result the French authorities intercepted Mr. Morse when the Paris landed at Havre and he was returned to the United States as an undesirable citizen to the French Government. Shortly thereafter Mr. Fletcher Dobyns, an attorney of Chicago, Illinois, and a member of the local staff of the United States Shipping Board, who had sole charge of the Morse matter applied to the Department of Justice for authority to appear before the United States Grand Jury. Such authority could, of course, be given him only by appointing him a special assistant to the Attorney General of the United States, charging him with the responsibility of prosecuting this case. He was appointed as the

Special Assistant Attorney General of the United States and was appointed without pay because he was already on the salary list of the United States Shipping Board. I think as to that, although I may be mistaken, I signed his appointment as Acting Attorney General; and he went to the office of the United States District Attorney here and presented with the United States District Attorney the issues involved in the so-called Morse indictment to the grand jury. I could say, if an opinion be permissible, that I do not think the Attorney General of the United States either suggested or indicated, or controlled, directly or indirectly, or otherwise, the presentation of this case, or the names of the others who should be presented to the grand jury for indictment.

Mr. Foster: And the indictment grew out of an investigation of the same nature of the matter by the so-called Walsh Committee?

Mr. Goff: Yes, sir.

Mr. Foster: Which investigated Morse's different companies through a period of two years?

Mr. Goff: They furnished the basis of the investigations.

Mr. Foster: Report of which is filed in the House?

Mr. Goff: Yes, sir."

Until I read the printed book containing the Keller charges from [fol. 29] which I have given quotations above, I had no knowledge whatever that the proceedings before the Grand Jury of the District of Columbia resulting in my indictment, including the appearance of Mr. Fletcher Dobyns before the Grand Jury, were not directed and controlled by the Attorney General of the United States. I did not know that the appointment of Fletcher Dobyns as Special Assistant to the Attorney General was purely formal, nor did I know that Mr. Dobyns had sought such appointment as the representation of the Shipping Board or the Fleet Corporation. I am advised by my counsel, and verily believe that the appearance of Mr. Fletcher Dobyns before the Grand Jury, and his activities therein resulting in my indictment were, and are, wholly illegal and constituted the presence before said Grand Jury of an unauthorized person in direct violation of law, and in violation of my constitutional rights; and I am making this affidavit at the earliest opportunity.

I believe that my inclusion as defendant in the indictment herein was procured by Flecher Dobyns, Esq., as Special Counsel of the United States Shipping Board Emergency Fleet Corporation through the abuse and misuse of the process of this court in the manner aforesaid in that said Fletcher Dobyns appeared before said grand jurors in the Southern District of New York and presented evidence, examined witnesses, and discussed said case resulting in the indictment found against me in the Southern District of New York, as aforesaid. The appearance and the participation in the proceedings before said Grand Jury in the Southern District of New York, by the said Fletcher Dobyns, as aforesaid, was, as I charge the fact to be, without authority and contrary to the laws of the United States, in that the [fol. 30] said Fletcher Dobyns was not "thereunto specifically directed" by the Attorney General of the United States, and was not

present in said grand jury room pursuant to any appointment by the Attorney General of the United States under any provision of law of the United States and the appearance and the participation of said Fletcher Dobyns in the proceedings before said Grand Jury were, and constitute, an abdication by the Attorney General and by the Department of Justice of the United States of his, or its, duties and functions under the laws of the United States, and an attempt by the Fleet Corporation to assume and exercise such duties and functions of the Attorney General and of the Department of Justice without authority of law, and through an attorney of the Fleet Corporation to institute and conduct the prosecution herein including the conduct of the grand jury proceedings which resulted in the indictment herein to the great prejudice, and in violation, of my rights and of the rights of each and every defendant herein.

In the quotations hereinbefore given from the so-called Keller charges and the reply of the Attorney General thereto, when the Attorney General refers to the so-called Morse indictments, he means and intends to refer to the indictment in this case against this deponent, together with other indictments now pending in the Southern District of New York; when the Attorney General speaks in said answer of certain of the attorneys of the United States Shipping Board who bore the title of special assistants to the Attorney General without pay, he means and intends to refer among others to the said Fletcher Dobyns; when the Attorney General states in said [fol. 31] answer that said Special Assistants to the Attorney General were at no time subject to the direction and control of the Department of Justice, and, in fact, were never controlled or directed by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs, he means and intends to refer to, the said Fletcher Dobyns and to his conduct in connection with the finding of the indictment in this present case, and he means and intends that neither he, the Attorney General, nor the Department of Justice, ever directed or controlled the said Fletcher Dobyns, specifically and otherwise; when the Attorney General states in his said answer that the connection of the Department of Justice with the so-called Morse indictment was solely formal, he means and intends to say, that the connection of the Attorney General and of his assistants with the present indictment was altogether formal and that he had no actual direction of, or control over, the proceedings leading to said indictment, but that the same were left solely to the said Fletcher Dobyns who was not under the direction or control of the said Attorney General.

I further aver upon information and belief as aforesaid that it now appears from this evidence so recently discovered that the said Fletcher Dobyns was not directed specifically, or otherwise, by the Attorney General of the United States to conduct the said Grand Jury proceedings which resulted in the finding of the indictment in this case.

This affidavit is in support of an application to the Court to vacate [fol. 32] the order of arrest by habeas corpus herein upon the ground,

among others, that the indictment was found under the direction of the said Fletcher Dobyns, who was not specifically, or otherwise, directed by the Attorney General to conduct the Grand Jury proceedings herein, and that his appearance before the Grand Jury in the Southern District of New York was wholly unauthorized and contrary to law and rendered illegal and void any indictment so returned by said Grand Jury, including the indictment found against this deponent, in which he was arrested in the Southern District of New York on the 6th day of February, 1923, as aforesaid.

I further submit that being in the legal custody of my said Washington bondsman, and on my way to attend the trial of my case, as aforesaid, I was immune and privileged from arrest while I was passing through the Southern District of New York to attend court, as aforesaid, in the District of Columbia.

I further specifically reply to the return of the Marshal as follows:

(a) In reply to the first paragraph of the said return I affirm that the said petition for writ of habeas corpus herein was sufficient to authorize the issuance of the writ, and, furthermore, that the additional facts herein stated support and justify the same under the act of February 5, 1867, Ch. 28, 14 Stat. L. 385, which reads as follows:

"The Petitioner or party imprisoned or restrained may deny any of the facts set forth in the return or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended by leave of the court or justice or judge before or after the same are filed, so that thereby the material facts may be ascertained."

And I aver and state the fact to be that the additional facts herein [fol. 33] stated and the suggestions herein contained were and are made by leave of the Court, specifically granted, when this matter came on for argument on the 17th day of February, 1923, before Hon. Francis S. Winslow, United States Judge.

(b) I deny that the indictment found against me by a Grand Jury of the United States of America for the Southern District of New York, as set forth in the second paragraph of the return of said Marshal, was properly found or that the same constituted a legal or valid indictment against me and I aver that the same was and is illegal for the reasons hereinbefore set out.

(c) I admit that a bench warrant was issued out of this Court, as stated in the paragraph marked three of the return of said Marshal for my apprehension, and I aver the fact to be that upon said bench warrant I was arrested for removal in the District of Massachusetts and was discharged from said arrest and said removal denied by Hon. Edwin S. Thomas, United States Judge, as hereinbefore set out.

I admit that I was taken into custody in the Southern District of New York, but I deny that said bench warrant or any process issued upon the indictment found against me in the Southern District of New York was sufficient or legal authority for my detention or arrest, and I deny that the same conferred any authority or right upon the Marshal of the Southern District of New York to detain me or restrain me of my liberty.

[fol. 34] (d) I deny that I was "duly arraigned" before the United States District Court in the Southern District of New York on the 6th day of February, 1923, and I aver that I was brought before said Court entirely against my will and in violation of my constitutional rights and in violation of the due process clause of the Constitution of the United States. I deny that I entered any plea whatsoever at the time of said pretended arraignment, and I deny that bail in the sum of $15,000 was fixed pending my trial upon the said indictment, and I aver the fact to be that my bail of $15,000 was given upon my application to be discharged by virtue of a writ of habeas corpus.

(e) I aver that I was and am detained and restrained of my liberty wholly in violation of my constitutional and legal rights and by virtue of illegal process and that the same constitutes an abuse of process and an unlawful restraint of my liberty, wholly without jurisdiction or authority therefor.

Wherefore the petitioner, Benjamin W. Morse, prays this Honorable Court that the writ of habeas corpus herein may be sustained and that my arrest and detention may be vacated and set aside, and that I be discharged from custody or detention, and that my bail be exonerated and discharged and that the entire proceedings resulting in the restraint of my liberty be declared to have been improper, illegal and in violation of my constitutional rights as guaranteed to me by the Constitution of the United States and the amendments [fol. 35] thereto.

This affidavit is filed with the express permission of the Court.

Benjamin W. Morse.

Sworn to before me this 23rd day of February, 1923. J. Benson Thomas, Notary Public, D. C. (Seal.)

[fol. 36] Jurat showing the foregoing was duly sworn to by Benj. W. Morse omitted in printing.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

WINSLOW, D. J.:

The petitioners seek release by habeas corpus from the custody of the United States Marshal for the Southern District of New York. They were arrested on February 6, 1923, within this district, by the Marshal upon a warrant issued out of this court July 19, 1922 directed to said Marshal. The indictment on which the warrant was issued was filed herein April 27, 1922. It charges the petitioners and twenty-two others with conspiring to use the mails in a scheme to defraud. The petitions on which the writs were issued urge that their restraint is illegal because the indictment is invalid, and does not state facts sufficient to constitute a crime.

[fol. 38] The return sets forth the finding and filing of the indictment and the issuance of the bench warrant. The petitioners traverse the return and set forth additional grounds of attack, in substance:

(1) That the petitioners, at the time of their arrest in this district, were enroute to the District of Columbia to attend the trial of an indictment pending against them and others in that district;

(2) That the decision of the District Judge in the District of Connecticut, petitioners' home district, in removal proceedings brought to secure the removal of the petitioner, Harry F. Morse, from that district to the Southern District of New York, was to the effect that the indictment was invalid and insufficient;

(3) That an unauthorized person was in attendance before the Grand Jury which returned the indictment in this district.

The material facts necessary to a decision are not disputed. There are questions of law, however, requiring consideration.

The petitioners contend that they were immune from this particular arrest for the reason that, when apprehended, they were en route through this district to the District of Columbia, there to answer another indictment and attend their own trial in that jurisdiction. The defendants, at the time of their arrest on the train, were under indictment returned in this district charging them with a felony. They were arrested by a duly authorized officer of the United States acting pursuant to a warrant duly issued out of this Court.

It is a common law rule that suitors and witnesses while going to, attending at and returning from Court are exempt from civil process. 5 Corpus Juris, 565; Larned v. Griffin 12 Fed. 590. The [fol. 39] reason for this rule has been generally recognized as the desire of the Courts to induce suitors to present their controversies for determination and to protect them from being subjected to service of process in a civil suit which could not otherwise reach them, except for their presence in the jurisdiction for the purpose of attending to the particular controversy. This immunity, under

the common law rule, does not, however, extend to one while in custody under criminal process or while attending or returning from his trial on a criminal charge. 3 Cyc. 923.

The petitioners are not privileged from criminal arrest while passing through this jurisdiction to attend a criminal trial, nor yet were they privileged from civil process, even in the District of Columbia or in this jurisdiction, while en route for the purpose indicated. The common law rule is intended to protect suitors voluntarily coming into and going from the jurisdiction.

Scott v. Curtis, 27 Vt. 762.
Netograph v. Scrugen, 197 N. Y. 277, 381.
Ex parte Levi, 28 Fed. 651.

The next question to be considered is the contention of the petitioners that this Court could not or should not assume jurisdiction of the petitioners because they were obligated to appear in the District of Columbia to stand trial on indictments there pending. This contention is without merit. While it is true that it is a well recognized rule of comity that where two Courts have concurrent jurisdiction of the same subject matter, the one which first assumes such jurisdiction holds it to the exclusion of the other until such jurisdiction is exhausted,—that rule has no application to criminal process [fol.40] where the defendant is accused of different crimes in different jurisdictions. The Supreme Court of the District of Columbia has jurisdiction of certain offenses committed within its territory and, presumptively, these defendants were en route to answer the charges in that jurisdiction. In like manner, this Court has jurisdiction of certain offenses committed within its territorial limits and this crime, for which the petitioners are indicted as it appears from the record, is separate and distinct from the crime charged in the District of Columbia. The Court of neither jurisdiction can restrain the other from proceeding on the respective indictments. The petitioners, pending the determination of the applications herein, were admitted to bail and thereby they were free to come and go, only bound to appear in the jurisdictions when required.

Peckham v. Henkel, 216 U. S. 482.
Ex parte Marrin, 164 Fed. 631.

The only remaining question to be considered is the contention of the petitioners that in certain removal proceedings in the District of Connecticut, on the pending indictments, removal to this district was refused on various grounds. Neither the sufficiency of the indictment nor the regularity of the proceedings before the Grand Jury are proper matters of inquiry on habeas corpus.

Ex parte Parks, 93 U. S. 18.
Ex parte Siebold, 100 U. S. 371.
Collins v. Loisel, 262 U. S. 427.

The petitions and writs of habeas corpus will be dismissed.

June 19, 1924.

Francis A. Winslow, U. S. District Judge.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING WRIT OF HABEAS CORPUS—Filed June 26, 1924

The writ of habeas corpus heretofore allowed to the above named Benjamin W. Morse having duly come on to be heard before the Hon. Francis A. Winslow, District Judge, at a term of this Court, held on the 26th day of June, 1924, and after hearing Nash Rockwood, of counsel for petitioner, in support of said writ, and John E. Joyce, Esq., Assistant to the United States Attorney, in opposition thereto, and due deliberation having been had thereon, on motion of William Hayward, United States Attorney, it is

Ordered that said writ be and the same hereby is dismissed, and it is

Further ordered, that the said Benjamin W. Morse surrender himself into the custody of the United States Marshal for the Southern District of New York on or before the 10th day of July, 1924.

Enter.

Francis A. Winslow, United States District Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 18, 1924

And now comes Benjamin W. Morse, by Nash Rockwood, his attorney, and in connection with his petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the proceedings in the above entitled cause in said District Court, error has intervened to his prejudice, and his defendant here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned, and in dismissing his petition and remanding him into custody, of the Marshal of the Southern District of New York. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the 5th amendment of the Constitution of the United States.

2. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody.

3. The Court erred in not holding and finding that the arrest of your petitioner while he was enroute to Washington as defendant in a criminal case there being actually tried against him by the [fol. 43] United States, was illegal and void and in violation of the

Constitution of the United States and the due process clause of the said Constitution.

4. The Court erred in not holding and finding that your petitioner was immune from arrest in the Southern District of New York at the time when he was passing through said District en route to his trial in the City of Washington, District of Columbia.

5. The Court erred in not holding and finding that your petitioner while enlarged in bail in the District of Columbia and being actually on trial there, was at the said time immune and privileged from arrest in the Southern District of New York.

By reason whereof, this petitioner and appellant prays that said judgment may be reversed and that he be ordered discharged.

July 10, 1924.

Nash Rockwood, Attorney for Petitioner and Appellant.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 18, 1924

And now comes Benjamin W. Morse and respectfully represents that on the 26th day of June, 1924, a judgment was entered by this Court dismissing his petition for habeas corpus, and remanding him to the custody of a Marshal of the Southern District of New York.

And your petitioner respectfully shows that in said record proceedings and judgment in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Therefore, your petitioner prays that an appeal may be allowed him from said judgment to the Supreme Court of the United States, and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal in the said Court.

July 10, 1924.

Benjamin W. Morse, by Nash Rockwood, Attorney for Petitioner.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 18, 1924

On reading of the petition of Benjamin W. Morse, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal as prayed for be and is herewith allowed.

And it appearing to the Court that a citation was duly served as provided by law, it is

Ordered that petition be admitted to bail pending the final determination of this appeal in the sum of $5,000. The appeal to operate as a supersedeas until the further order of this Court, unless it shall appear to the Court that the perfection and argument of said appeal have been unduly delayed. If not promptly perfected and argued the said Appellee may move upon five days' notice to the Appellant for the vacation of said supersedeas.

Cost bond on appeal is hereby fixed in the sum of $100.

Further ordered upon consent of counsel in open court that this order be entered nunc pro tunc as of July 10, 1924.

Francis A. Winslow, U. S. D. J.

[File endorsement omitted.]

[fols. 46 & 47] CITATION—In usual form, showing service on Wm. Hayward; filed July 18, 1924; omitted in printing

[fol. 48] [File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION EXTENDING TIME

It is hereby stipulated, that the time of the appellant to comply with citation, and cause record on appeal herein to be filed in the office of the Clerk of the United States Supreme Court, be extended up to and including August 20th, 1924.

Dated New York, August 5th, 1924.

Wm. Hayward, U. S. Attorney, Attorney for the Appellee.
Nash Rockwood, Attorney for Appellant.

So Ordered: Alex. Gilchrist, Jr., Clerk.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City New York, in the Southern District of New York this nineteenth day of August, in the year of our one thousand nine hundred and twenty-four, and of the Independence of the said United States the one hundred and forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the United States, Southern District of New York.)

Endorsed on cover: File No. 30,562. S. New York D. C. U. S. Term No. 597. Benjamin W. Morse, appellant, vs. The United States of America. Filed August 20, 1924. File No. 30,562.

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

HARRY F. [illegible], APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF [illegible]

FILED [illegible]

(30,563)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 598

HARRY F. MORSE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] **IN UNITED STATES DISTRICT COURT**

PETITION FOR WRIT OF HABEAS CORPUS—Filed Feb. 6, 1923

To the Honorable the District Court of the United States in and for the Southern District of New York:

The petition of Harry F. Morse, respectfully shows that he is a resident of Noank, State of Connecticut, and is now actually imprisoned and restrained of his liberty and detained by power of the authority of the United States in the custody of the United States Marshal for the above named district by reason of the fact and circumstances, and not otherwise. Except as is hereinafter stated, your petitioner is not committed or detained by virtue of any process or mandate issued by any Court of the United States, or by any Judge thereof; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree or final order. The cause or pretense of the imprisonment or restraint, according to the best of the knowledge and belief of your Petitioner, is that Petitioner was arrested, apprehended and taken into custody in the Southern District of New York, on February 6, 1923, by said Marshal by virtue of an alleged warrant issued out of the above named court based upon an alleged indictment against your Petitioner and others said to have been found by the Grand Jury in said Court in the Southern District of New York on April 27, [fol. 2] 1922; your Petitioner further states, upon information and belief, that said indictment is invalid and does not state a crime, and does not state facts sufficient to constitute a crime, and that the validity of said indictment has been passed upon by the United States District Court for the District of Connecticut, in the case of United States against Harry F. Morse, and that it was held and decided by said court that said indictment was invalid and it was so declared by order of said court. A copy of said order and the opinion filed therewith is attached hereto marked Exhibit "A" and made a part hereof.

Wherefore your Petition- prays that a writ of habeas corpus issue directed to the said Marshal commanding him to produce Petitioner before this Honorable Court, together with the true cause of the detention of Petitioner to the end that inquiry may be had in the premises; and Petitioner respectfully requests that he may be permitted on the hearing of said writ to submit such further affidavits and documents as he may be advised in support of his said application and that pending the hearing and determination upon said writ that

Petitioner be admitted to bail under said writ in such reasonable amount as to the Court may seem proper.

Dated, the 6th day of February, 1923.

Harry F. Morse. Nash Rockwood, Charles Tressler Lark, Attorneys for Petitioner.

Office and Post Office Address, 527 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 3] Jurat showing the foregoing was duly sworn to by Harry F. Morse, omitted in printing.

[File endorsement omitted.]

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Writ of Habeas Corpus Requiring the United States Marshal to produce the Body of Harry F. Morse

RETURN TO WRIT OF HABEAS CORPUS—Filed March 10, 1923

William C. Hecht, United States Marshal for the Southern District of New York, respectfully makes the following return to the writ of habeas corpus herein:

First. Respondent alleges that the petition for the writ of habeas corpus herein is insufficient in that it does not state any facts sufficient to authorize the issuance of such writ.

Second. The grand jurors of the United States of America for the Southern District of New York did present to the United States District Court for the said District an indictment against the same Harry F. Morse and others and the said indictment was duly filed in this Court on April 27, 1922.

Third. That thereafter, to wit, on May 10, 1922, a bench warrant was issued out of this Court upon the said indictment for the apprehension of the said defendants.

Fourth. That the defendant Harry F. Morse was taken into custody in the Southern District of New York in pursuance of said aforesaid bench warrant and was detained by me under authority thereto.

[fol. 5] Fifth. On information and belief, thereafter on February 6, 1923, the defendant was duly arraigned before the United States District Court in the said Southern District of New York and a plea of not guilty was entered to the aforesaid indictment and bail in the sum of $15,000 was fixed pending trial upon the said indictment, which bail was not furnished by the said Harry F. Morse.

Wherefore, your respondent prays that the writ of habeas corpus herein may be dismissed and that the said Harry F. Morse be remanded to the custody of the United States Marshal for the Southern District of New York to be dealt with according to law.

William C. Hecht.

Jurat showing the foregoing was duly sworn to by Wm. C. Hecht, omitted in printing.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HARRY F. MORSE

STATE OF NEW YORK,
County of New York, ss:

Harry F. Morse, being duly sworn, says:

I submit the following affidavit in support of my application by writ of habeas corpus, verified February 6th, 1923, and to vacate and set aside my said arrest, and as a traverse and reply to the "return to writ of habeas corpus," filed herein on the 17th day of February, 1923, by William C. Hecht, United States Marshal for the Southern District of New York, and in accordance with the provisions of the revised statutes of the United States, I suggest to the Court the facts herein contained in addition to the averments in my petition for said writ of habeas corpus, in support of my contention that my arrest and detention by the United States Marshal for the Southern District of New York, as set forth in said writ of habeas corpus, was wholly illegal, unauthorized, without warrant of law, a violation of my constitutional rights, and that I was arrested and detained without jurisdiction or proper authority.

[fol. 7] In January, 1922, two indictments were returned against me, in connection with others, by a Grand Jury in the District of Columbia. The first indictment, known as Criminal Indictment No. 38753, was returned by a Grand Jury in the Supreme Court of the District of Columbia and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard O. White and Colin H. Livingstone." In said indictment I am charged, in connection with said other defendants, with having committed the crime of conspiracy to defraud the United States and to commit an offense against the United States by defrauding the United States Shipping Board Emergency Fleet Corporation, as provided by Section 37 of the Federal Code. The second of said indictments is known as Criminal No. 39033, and was returned by a

Grand Jury in the Supreme Court of the District of Columbia in January, 1922, and is entitled "United States v. Charles W. Morse, Erwin A. Morse, Harry F. Morse, (this deponent) Benjamin W. Morse, George M. Burditt, Nehemiah H. Campbell, Rupert M. Much, Philip Reinhardt, Leonard D. Christie, William W. Scott, Richard O. White and Colin H. Livingstone." I am charged in connection with said other defendants in said indictment, with having committed the crime of conspiracy to defraud the United States, as pro-
[fol. 8] vided by Section 37 of the said Federal Penal Code. I was arraigned upon both of said indictments, pleaded not guilty to each thereof, and was admitted to bail on each indictment in the sum of $10,000. I furnished bonds in said amounts, with George Ray, a resident of Washington, D. C. as my surety. My said bonds were duly approved by the Court and I was ordered by the Court to be released from the custody of the Marshal and was thereupon placed in the legal custody of my bondsman. Said bonds have at all times been in full force and effect since said time, and were in full force and effect at the time of my arrest herein in the Southern District of New York, on the 6th day of February, 1923, and I was at said time and am now in the legal custody of my said bondsman in said Washington, criminal cases.

Said criminal cases in the District of Columbia were at issue and had been peremptorily set for trial in the Supreme Court in said District of Columbia, by Justice Wendell P. Stafford, for 10:30 A. M. of February 6th, 1923, and all defendants were directed by the Court to appear at said time for trial.

I reside at New London, Conn., and in order to attend said trial at Washington on February 6th, 1923, I left New London on February 5th, 1923, by the Federal Express of the New York, New Haven & Hartford Railroad Company, which was the usual and shortest and most direct railroad route to Washington, D. C. As I was en route to Washington on said train and asleep in my berth thereon, I was forceably seized by the United States Marshal at New York City, as said Federal Express passed through New York City, and was forceably taken from the train at the Pennsylvania Station, and sub-
[fol. 9] jected to said arrest by said Marshal, from which I seek to be discharged herein upon the ground that the same was and is wholly illegal, unauthorized, and in violation of my constitutional rights. I inquired of the representatives of said Marshal at the time of my said arrest by what authority I was taken into custody, and he thereupon exhibited to me a bench warrant issued upon an indictment found against me in April, 1922, in the Southern District of New York, which is hereafter referred to, which said bench warrant was dated July, 1922. I was taken by said Marshal and his assistants from said train to the Federal Building in New York City, notwithstanding the fact that I explained in detail and at length to the said Marshal and his assistants that I was on my way to attend the trial of my criminal cases at Washington on the morning of February 6th, 1923, in Justice Stafford's court. I requested permission to telephone to my counsel, Nash Rockwood, who was at the Willard Hotel, at Washington, D. C., awaiting the calling of my

said case on the morning of February 6th, and was refused permission to do so by said Marshal and his assistants, and I was told that I could not communicate with my said counsel. I was detained against my will in the office of the Marshal in the Federal Building, on said day, from about two o'clock in the morning of February 6th until I was thereafter and during the afternoon of February 6th released by order of United States Judge Winslow, upon my application for a habeas corpus, and upon my furnishing bail approved by the Court in the sum of $15,000. By reason of said arrest and de- [fol. 10] tention I was wholly unable to proceed with my journey to Washington, and when my case was called before Justice Stafford on the morning of February 6th, at 10:30 A. M., I was unable to be present in court.

In April, 1922, I was also indicted by a Grand Jury in the Southern District of New York, charged with having committed the crime of conspiracy to defraud the United States and to violate Section 37 of the Penal Code, and Section 215 of the Penal Code by using the mails to defraud, in the matter of the sale of stock of the United States Steamship Company. A bench warrant was issued upon said indictment, which was the same bench warrant upon which I was arrested on February 6th, 1923, as hereinbefore detailed. Said bench warrant was sent to the United States Attorney in the State of Connecticut, and proceedings under the United States Revised Statutes to remove me from my place of residence in the State of Connecticut to the Southern District of New York were instituted by the United States in Connecticut in July, 1922, before U. S. Commissioner Lavery. Such proceedings were there had that I was held by the Commissioner *fro* removal to the Southern District of New York, and was committed to the Marshal pending application for a warrant of removal to the United States Judge of the District. I immediately applied by writ of habeas corpus and certiorari for my discharge, and the United States, at the same time, applied to Hon. Edwin S. Thomas, United States Judge, for a warrant for my removal. Pending the decision of said applications, [fol. 11] I was released upon bail, and during all of said times my bail in the District of Columbia was, as aforesaid, in full force and effect.

Said proceedings upon the application of the Government for my removal to the Southern District of New York and my application for a discharge upon writ of habeas corpus and certiorari were consolidated and heard together, and after a full consideration of both applications, and on January 25th, 1923, Judge Edwin S. Thomas, United States Judge for the District of Connecticut, granted my application for discharge upon writ of habeas corpus, and denied the Government's application to remove me to the Southern District of New York. Judge Thomas at said time had full jurisdiction of the subject matter and of my presence under the provisions of Section 1014 of the Revised Statutes of the United States. I annex hereto and make a part of this affidavit, the same as if herein written at length, a copy of the opinion of Judge Thomas granting my said discharge and denying the right of the United States to remove me

to the Southern District of New York. The order of Judge Thomas so discharging me and denying the right of the United States to remove me to the Southern District of New York had not been appealed from by the United States at the time of my said arrest on February 6th, 1923.

In the argument of the United States Attorney and of my counsel before Judge Thomas, the United States Attorney urged that [fol. 12] the indictment charged the commission of a criminal offense under the Federal Laws, and was legally sufficient as an indictment, and was prima facie evidence of probable cause. The question of the legal sufficiency of the indictment was therefore squarely and directly before Judge Thomas for decision, and was submitted to him both by the Government and by my counsel. Judge Thomas held, in his opinion which is submitted herewith, that the said indictment in the Southern District of New York, upon which I have now been arrested in New York as hereinbefore detailed, did not charge the commission of a criminal offense against the laws of the United States and that upon the facts of the case as shown before the Commissioner probable cause to believe me guilty of a criminal offense against the United States was not made out by the Government.

At the time of my arrest in the Southern District of New York, the proceedings in Connecticut before United States Judge Thomas had fully terminated, and I had been and was discharged from the custody of the United States in Connecticut, and my bond in said proceedings in Connecticut was fully exonerated and it had been determined that the United States was without legal right or authority to remove me to the Southern District of New York for trial upon the illegal indictment aforesaid. On the 6th day of February, 1923, when I was arrested herein, as aforesaid, I was in the sole legal custody of my bondsman upon the indictments found in the Washington jurisdiction.

The United States of America was the complainant against me both in the New York and the Washington jurisdictions.

[fol. 13] The consent of the Court in Washington, nor the consent of Judge Wendell P. Stafford, before whom my trial was set for February 6th, as aforesaid, was not asked or obtained for my arrest and detention in New York, or for my removal to the Southern District of New York.

My brother, Benjamin W. Morse, was likewise indicted with me in Washington and New York, and had also given bail in Washington, was subjected to removal proceedings in Massachusetts seeking to remove him from the State of Massachusetts, the place of his residence, to the Southern District of New York. The said removal proceedings which were instituted by the United States in Boston, before United States Commissioner Hon. William A. Hayes 2nd, were pending undetermined on February 6th, 1923, and on February 8th, 1923, my said brother, Benjamin W. Morse, was discharged by said United States Commissioner Hayes, whose decision was as follows:

"This is to certify that I, William A. Hayes, 2nd, United States Commissioner for the District of Massachusetts, have on this 8th day of February, 1923, found that the evidence submitted by the defendant is sufficient to overcome the presumption of the Indictment, and that I have, therefore, discharged the defendant.

(Signed) William A. Hayes, 2nd, United States Commissioner." (Seal.)

By virtue of the said decision of said Commissioner in Boston, my said brother was fully discharged from custody in Massachusetts and his bond exonerated.

I submit to this honorable Court that my arrest in the Southern District of New York was a violation of my constitutional rights under [fol. 14] the due process clause of the Constitution of the United States, and an illegal deprivation of my liberty, for the reason, among others, that the same operated to prevent my attendance in Washington on February 6th, 1923, when my criminal cases were set for trial, thereby rendering liable to forfeiture the bond which I had given in the Washington jurisdiction.

I further submit that inasmuch as I had been discharged by United States Judge Thomas in the District of Connecticut in proceedings wherein said Judge had jurisdiction both of my person and of the subject matter, said decision was final and conclusive upon the United States until reversed upon appeal.

I further submit that the indictment found against me in the Southern District of New York was and is wholly illegal and does not charge an offense under Federal Statutes, and did not warrant my arrest or detention, as aforesaid, and that there was an entire absence of weight or jurisdiction thereunder to authorize the restraint of my personal or the deprivation of my liberty.

I further claim and submit that the said indictment so returned against me was illegally found, for the reason that there was improperly and illegally present before the Grand Jury which returned said indictment an unauthorized person, to-wit, one Fletcher Dobyns, who appeared before the Grand Jury pursuant to an apparent authority given to him by Hon. Harry M. Daugherty, Attorney General of the United States, purporting to appoint said Dobyns as a special assistant to the Attorney General, with authority to appear before the said Grand Jury. The letters so appointing the said Dobyns are [fol. 15] filed with the Clerk of this Court, and are as follows:

"CBS-VHB. November 21, 1921.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, Washington, D. C.

SIR: In connection with the investigation and prosecution of alleged violations of sections 35, 37, 47, 46, and 48 of the Criminal Code of the United States, Section 41 of the Act of September, 1916, as amended by the Act of July 15, 1918, and of other provisions of law in the District of Columbia, the Eastern District of Virginia,

the Eastern District of Pennsylvania, the Southern District of New York, the Districts of Maryland, Connecticut and Massachusetts, and other judicial districts, by certain corporations, to-wit:

The Virginia Shipbuilding Corporation,
The Groton Iron Works,
The United States Steamship Company,
The Binghamton Steamship Company,
The Huron Steamship Company,
The St. Paul Steamship Company,
United States Ship Corporation,
Steamship Operating Company,
Hudson Navigation Company,
United States Transport Company,
Minneapolis Steamship Company,
C. W. Morse & Company,
Travellers Steamship Company,
Traders Steamship Company,
Transfer Steamship Company, and
United States Transport, Import and Export Company,

and by individuals acting in behalf of said corporations as officers, directors, employees, agents and attorneys, in connection with the construction of shipyards and their appurtenances in certain of said districts, the construction of ships for, and the operation thereof by, the United States Shipping Board Emergency Fleet Corporation, and the presentation of claims to the same, and to the United States, growing out of such transactions, you are hereby appointed a Special Assistant Attorney General and are authorized and directed, as such Special Assistant to the Attorney General, to conduct, in any of said districts, and in any other district, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

[fol. 16] You are to receive no compensation other than that received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) H. M. Daugherty, Attorney General."

"CBS. April 1, 1922.

Fletcher Dobyns, Esq., Special Counsel U. S. Shipping Board, E. F. C., 45 Broadway (Room 521), New York City.

SIR: In connection with the investigation and prosecution of alleged violations of Section 37, 215 and 216 of the Criminal Code of the United States and of other provisions of law, in the Southern District of New York, and in other judicial districts by the following named persons, to-wit:

Charles W. Morse, Erwin A. Morse, B. W. Morse, Harry F. Morse, B. Murray, George M. Burditt, R. M. Much, Nehemiah Campbell, R. O. White, Martin J. Gillen, Stuart Gibboney, William A. Barber, James A. Lynch, Mark L. Gilbert, G. S. Foster, H. E. Boughton, W. Sheridan Kane, William Dennis, James O'Brian, Jams B. Nel-

son, Arthur Kohler, Lawrence Bremer, Maurice O. Purdy, Arthur Braun, Edward Lucas, Harvey A. Willis, A. U. Rodney, J. D. Sugarman, Frank Epps, E. M. Fuller, L. L. Winkelman, Frank Batman, E. H. McHenry, A. J. Krebs, Jr., Samuel D. Disbrowk, George J. Strong, Dexter Rood, Jr., William Guggenheim, B. C. Higley, by persons doing business under the firm names of Slattery & Co., Jones & Baker and Schmidt & Baery, and by other persons concerned in the conduct of the business and the sale of the capital stock of the following named concerns, to-wit:

United States Steamship Company,
Frederik Steamship Company,
Bedford Steamship Company,
Newport Steamship Company,
Northland Steamship Company,
Owego Steamship Company,
Chemung Steamship Company,
J. G. McCullough Steamship Company,
Lansing Steamship Company,
[fol. 17] Wm. Castle Rhodes Steamship Company,
Fong Suey Steamship Company,
Binghamton Steamship Company,
Minnesota Steamship Company,
Huron Steamship Company,
St. Paul Steamship Company,
Steamship Operating Company,
United States Transport, Import and Export Company,
United States Transport Company, Inc.,
Hudson Navigation Company,
Groton Iron Works,
Virginia Shipbuilding Corporation, formerly American Shipbuilding Corporation,
United States Ship Corporation,
United States Steamship Company of Delaware (proposed),
C. W. Morse & Company, Incorporated,
Robert Palmer & Sons Shipbuilding & Marine Railway Co.,
Woodlaw Corporation of Saratoga (Morse Park, Inc.),
General Realty Co.,
New York-Knickerbocker Real Estate Co.,
New York, Albany & Troy Transportation Co.,
Albany River Trust Co.,
Morse Securities Co.,
New York & Buffalo Steamship Co.,
New York, Norfolk & Washington Steamship Co.,
Gunston Hall Steamship Co.,
Betsey Bell Steamship Company,
Venada Steamship Co.,
H. F. Morse Steamship Co.,
E. A. Morse Steamship Co.,
Clemens C. Morse Steamship Co.,

Jennie R. Morse Steamship Co.,
Anna E. Morse Steamship Co.,
Colin H. Livingstone Steamship Co.
Georgie M. Morse Steamship Co.,
Follard Steamship Co.,
Nameang Steamship Co.,
Worcester Steamship Co.,
Quinnipine Steamship Co.,
Merry Mount Steamship Co.,
Hartford Steamship Co.,
Honnedaga Steamship Co.,
Provincetown Steamship Co., and
Hopatcong Steamship Co.;

You are hereby authorized and directed as Special Assistant to the Attorney General, to conduct, in any of the said districts, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct.

You are to serve without compensation other than received by you as Special Counsel, United States Shipping Board.

Respectfully, (Signed) Guy D. Goff, Acting Attorney-General."

[fol. 18] At the date of said letter the said Dobyns was and ever since has been Special Counsel of the United States Shipping Board and United States Shipping Board Emergency Fleet Corporation (hereinafter called the Fleet Corporation). Said Fleet Corporation is a private business corporation organized and existing under the laws of the District of Columbia. At the date of said letter he was not and never since has been an officer of the Department of Justice. At the date of said letter the said Dobyns was not and never has since been compensated or agreed to be compensated by the Department of Justice or from any appropriation made for the Department of Justice or any subdivision thereof or for expenditure under the direction of the Attorney General of the United States in the conduct of his duties as head or in the conduct of the work of the Department of Justice. For his services in conducting said proceedings before the grand jury which resulted in the indictment herein, the said Dobyns was to be compensated and theretofore was agreed to be compensated, as I am informed and believe, exclusively out of funds of the Shipping Board and Fleet Corporation; and I am informed and believe that prior to the date of said letter said Dobyns was acting, and ever since July 29, 1921, up to a comparatively recent time he has acted exclusively under the authority, direction and control of the Fleet Corporation or of the United States Shipping Board (hereinafter in this affidavit called the "Shipping Board") and not under the control or direction of the Attorney General.

[fol. 19] Fletcher Dobyns, Esq., is and ever since on or about July 29, 1921, has been one of the Attorneys for the Shipping Board and Fleet Corporation. He is not now and never during that period has

been an officer of the Department of Justice. Upon information and belief he is and during all of said period has been compensated for his services by the Shipping Board and Fleet Corporation. He is not and has not been or agreed to be compensated by the Department of Justice or any subdivision there. There is no provision of law under which Mr. Dobyns is or was authorized to be appointed specially or otherwise without compensation or while an attorney of the Fleet Corporation to conduct grand jury trials. Section 3 of the Merchants Marine Act of 1920 does not authorize an attorney employed pursuant thereto to conduct such proceedings. The pretended appointment or designation of Mr. Dobyns by the Attorney-General of the United States, of which a copy is set forth herein, was not in pursuance of or in compliance with the Act of Congress of July 30, 1906 (34 United States Statutes at large, page 816). I am informed and believe that neither his said so-called letter of appointment by the Department of Justice, nor a certified copy thereof, nor any oath thereunder, nor his appointment or employment as an attorney of the Shipping Board or Fleet Corporation, nor a certified copy thereof, nor any oath thereunder, has been filed in this Court. Mr. Dobyns was in charge of the grand jury proceedings which resulted in the indictment in the Southern District of New York. He appeared before such grand jury, not as a witness, but in control of and during the presentation to the grand jury of the evi-[fol. 20] dence on which the indictment herein was found. He is not nor during any of the times herein mentioned has he been United States attorney or a member of the staff of the United States Attorney for the Southern District of New York.

The proceedings before, and the submission of evidence to, the grand jury which resulted in and on which the indictment herein is based were, at the instance of and solely under the direction and control of the Fleet Corporation, or the Shipping Board; such proceedings were not, as required by law, conducted by, or under the control of the United States Attorney for the Southern District of New York or any member of his staff, and were not conducted by any attorney or counsellor authorized or appointed, therefore, under any provision of law, nor were they specifically directed by the Attorney General of the United States.

In a motion heretofore filed in the Southern District of New York by defendants jointly indicted with deponent, seeking to set aside and quash the said indictment because the said Fletcher Dobyns appeared before the grand jury in the Southern District of New York, the said Fletcher Dobyns filed his affidavit dated May 18, 1922, in the course of which said Fletcher Dobyns deposed as follows:

"Southern District of New York, ss:

Fletcher Dobyns, being first duly sworn, on his oath, deposes and says on or about the 29th day of July, 1921, I was appointed Special Counsel for the United States Shipping Board Emergency Fleet Corporation to investigate the transactions on Charles W. Morse and his associates with said Fleet Corporation. As a result of an exhaustive investigation, I reached the conclusion, that Mr. Morse and his as-

sociates have been guilty of violating certain sections of the Criminal Code of the United States and laid the matter before the Attorney General of the United States. Thereupon the Attorney General requested me to present the evidence which I had obtained to a grand jury, or grand juries, as the circumstances might require. He then addressed to me the following letter (setting out letter of November [fol. 21] 21, 1921, purporting to appoint the said Fletcher Dobyns as Special Assistant to the Attorney General). On the 29th day of November, 1921, I executed and filed in the Department of Justice the following oath:

'I, Fletcher Dobyns, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of Special Assistant to the Attorney General of the United States on which I am about to enter, so help me God.'

(Signed) Fletcher Dobyns.

'Subscribed and sworn to before me this 29th day of November, A. D., 1921. J. Pierson Jones, Notary Public.' (Seal.)

* * * * * * *

"During the investigation and presentation of this case to the grand jury I have received instructions and advice from the Attorney General and his assistants and have not received instructions or advice from the Fleet Corporation or from anyone else."

I did not learn until February 7th, 1923 that the statements so made by Mr. Dobyns as to the sources and extent of his authority to appear before said grand jury in New York and the grand jury in the District of Columbia, resulting in indictments against me in both jurisdictions, was fully disputed by the Hon. Harry M. Daugherty, Attorney General of the United States. There has just been brought to my attention, and we have just obtained a printed book issued by the Government Printing Office, Washington, D. C., entitled, "Charges of Hon. Oscar E. Keller against the Attorney General of the United States" and containing at length in 573 printed pages the hearings before the Committee on the Judiciary in the House of Representatives, extending from November 16, 1922, and concluding on December 21, 1922, in the matter of the charges of the said Keller against the said Attorney General.

Specification No. 9 of the said charges against the said Attorney General printed at length on page 58 of the said printed book spe- [fol. 22] cifically charges that the said Harry M. Daugherty, as Attorney General of the United States:

"Did prostitute his high office for purpose of personal vengeance seeking and obtaining an indictment of the said Morse and of his sons as directors of the Virginia Shipbuilding Corporation on a charge of having violated the Federal Statutes; that at the same time

the said Harry M. Daugherty obtained the indictment of three attorneys said to have advised the company in connection with the alleged illegal acts but failed, neglected and refused to seek indictments of other directors of the company equally guilty of the alleged violation of the Federal Statute, if any, and also failed to seek the indictment of another attorney—equally guilty with the attorneys, indicted, the said principal attorney being holder of a position of great responsibility and trust in the office of the Attorney General."

The answer of the Attorney General to this specification was as follows (p. 59 of the printed book):

"The Attorney General begs leave to inform your Honorable Committee that the connection of the Department of Justice with the so-called Morse indictment was wholly formal and in proof thereof alleges and states to your Committee as follows:

That the facts and circumstances justifying the return of the indictment in question arose out of certain transactions which Mr. Morse and his co-defendants had with the United States Shipping Board subsequent to the entry of the United States into the World War; that the United States Shipping Board had and maintained its own legal department, and as such, investigated the facts giving rise to such indictments; that while it is true that certain of the attorneys representing the United States Shipping Board bore the title of Special Assistant to the Attorney General without pay they were at no time subject to the direction and control of the Department of Justice, and, in fact, were never directed or controlled by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs. The Attorney General did not direct that any person, a director or otherwise, should, or should not, be indicted, but left that matter to the officials in charge of the investigation."

In the same printed book, at p. 547 thereof, appears the testimony of Colonel Guy D. Goff, who was the Acting Attorney General who signed an order of appointment of Fletcher Dobyns as Special Assist- [fol. 23] ant to the *to the* Attorney General, dated April 21, 1922, subsequent to the finding of the indictments in the jurisdiction of the District of Columbia, hereinbefore referred to. Colonel Goff testified, among other things, as follows:

"Mr. Howland: Mr. Goff, may I ask your attention to specification No. 9, on page 46 of the facts?

Mr. Classon: What is that?

Mr. Howland: I say specification No. 9 in the committee proof, page 46, and in the hearings——

Mr. Classon: Well, we don't care about that; we have the committee print.

Mr. Goff: It is on page 47.

Mr. Howland: Yes, in the committee print page 47. That refers to the Virginia Shipbuilding Corporation and the charge attempted

to be made is that a certain man by the name of Morse was indicted because of some previous relation which he sustained with the Attorney General of the United States. What is the situation in reference to that so-called Morse indictment, Mr. Goff, as you are informed on the subject?

Mr. Goff: The so-called Morse indictment grew out of certain transactions which Mr. Morse had with the United States Shipping Board Emergency Fleet Corporation. These transactions were reported to the Department of Justice by the legal department of the United States Shipping Board for such action as the Department of Justice might conclude was warranted in the premises. In due course the papers were sent to the District Attorney whose district had jurisdiction. This case was sent to the United States Attorney for the District of Columbia. I was present on two several occasions when the Attorney General stated to the general counsel of the United States Shipping Board that the Department of Justice did not care to have anything to do with this prosecution and that inasmuch as the United States Shipping Board had a very large and experienced staff of lawyers that the Attorney General, would prefer that all matters connected with the Virginia Shipbuilding Corporation, one of Mr. Morse's corporations, and with Mr. Morse, his sons, and others, be conducted solely by the legal staff of the United States Shipping Board in conjunction with Major Peyton Gordon, the United States District Attorney for the District of Columbia. That was so understood, and to my knowledge, so far as my knowledge goes, the Attorney General gave no directions to these attorneys as to what they should do.

[fol. 24] Mr. Morse at one time during the absence of the Attorney General in the West on official business went abroad and the Department of Justice was requested to use its good offices with the State Department to have Mr. Morse intercepted and asked to return to this country. I, personally, took the matter up with the State Department in conjunction with Mr. Schlessinger, the general counsel of the United States Shipping Board. The Attorney General himself personally knew nothing of these proceedings and, in fact, was not in the District of Columbia at the time they occurred. As a result the French authorities intercepted Mr. Morse when the Paris landed at Havre and he was returned to the United States as an undesirable citizen to the French Government. Shortly thereafter Mr. Fletcher Dobyns, an attorney of Chicago, Illinois, and a member of the local staff of the United States Shipping Board, who had sole charge of the Morse matter applied to the Department of Justice for authority to appear before the United States Grand Jury. Such authority could, of course, be given him only by appointing him a special assistant to the Attorney General of the United States, charging him with the responsibility of prosecuting this case. He was appointed as the Special Assistant Attorney General of the United States and was appointed without pay because he was already on the salary list of the United States Shipping Board. I think as to that, although I may be mistaken, I signed his appointment as Acting Attorney General; and he went to the office of the United States District Attorney here

and presented with the United States District Attorney the issues involved in the so-called Morse indictment to the grand jury. I could say, if an opinion be permissible, that I do not think the Attorney General of the United States either suggested or indicated, or controlled, directly or indirectly, or otherwise, the presentation of this case, or the names of the others who should be presented to the grand jury for indictment.

Mr. Foster: And the indictment grew out of an investigation of the same nature of the matter by the so-called Walsh Committee?

Mr. Goff: Yes, sir.

Mr. Foster: Which investigated Morse's different companies through a period of two years?

Mr. Goff: They furnished the basis of the investigations.

Mr. Foster: Report of which is filed in the House?

Mr. Goff: Yes, sir."

Until I read the printed book containing the Keller charges from [fol. 25] which I have given quotations above, I had no knowledge whatever that the proceedings before the Grand Jury of the District of Columbia resulting in my indictment, including the appearance of Mr. Fletcher Dobyns before the Grand Jury, were not directed and controlled by the Attorney General of the United States. I did not know that the appointment of Fletcher Dobyns as Special Assistant to the Attorney General was purely formal, nor did I know that Mr. Dobyns had sought such appointment as the representation of the Shipping Board or the Fleet Corporation. I am advised by my counsel, and verily believe that the appearance of Mr. Fletcher Dobyns before the Grand Jury, and his activities therein resulting in my indictment were, and are, wholly illegal and constituted the presence before said Grand Jury of an unauthorized person in direct violation of law, and in violation of my constitutional rights; and I am making this affidavit at the earliest opportunity.

I believe that my inclusion as defendant in the indictment herein was procured by Flecher Dobyns, Esq., as Special Counsel of the United States Shipping Board Emergency Fleet Corporation through the abuse and misuse of the process of this court in the manner aforesaid in that said Fletcher Dobyns appeared before said grand jurors in the Southern District of New York and presented evidence, examined witnesses, and discussed said case resulting in the indictment found against me in the Southern District of New York, as aforesaid. The appearance and the participation in the proceedings before said Grand Jury in the Southern District of New York, by the said Fletcher Dobyns, as aforesaid, was, as I charge the fact to be, without authority and contrary to the laws of the United States, in that the [fol. 26] said Fletcher Dobyns was not "thereunto specifically directed" by the Attorney General of the United States, and was not present in said grand jury room pursuant to any appointment by the Attorney General of the United States under any provision of law of the United States and the appearance and the participation of said Fletcher Dobyns in the proceedings before said Grand Jury were, and constitute, an abdication by the Attorney General and by

the Department of Justice of the United States of his, or its, duties and functions under the laws of the United States, and an attempt by the Fleet Corporation to assume and exercise such duties and functions of the Attorney General and of the Department of Justice without authority of law, and through an attorney of the Fleet Corporation to institute and conduct the prosecution herein including the conduct of the grand jury proceedings which resulted in the indictment herein to the great prejudice, and in violation, of my rights and of the rights of each and every defendant herein.

In the quotations hereinbefore given from the so-called Keller charges and the reply of the Attorney General thereto, when the Attorney General refers to the so-called Morse indictments, he means and intends to refer to the indictment in this case against this deponent, together with other indictments now pending in the Southern District of New York; when the Attorney General speaks in said answer of certain of the attorneys of the United States Shipping Board who bore the title of special assistants to the Attorney General without pay, he means and intends to refer among others to the said Fletcher Dobyns; when the Attorney General states in said [fol. 27] answer that said Special Assistants to the Attorney General were at no time subject to the direction and control of the Department of Justice, and, in fact, were never controlled or directed by the Department of Justice, but were subject solely to the direction and control of the United States Shipping Board and those charged with the administration of its legal affairs, he means and intends to refer to the said Fletcher Dobyns and to his conduct in connection with the finding of the indictment in this present case, and he means and intends that neither he, the Attorney General, nor the Department of Justice, ever directed or controlled the said Fletcher Dobyns, specifically and otherwise; when the Attorney General states in his said answer that the connection of the Department of Justice with the so-called Morse indictment was solely formal, he means, and intends to say, that the connection of the Attorney General and of his assistants with the present indictment was altogether formal and that he had no actual direction of, or control over, the proceedings leading to said indictment, but that the same were left solely to the said Fletcher Dobyns who was not under the direction or control of the said Attorney General.

I further aver upon information and belief as aforesaid that it now appears from this evidence so recently discovered that the said Fletcher Dobyns was not directed specifically, or otherwise, by the Attorney General of the United States to conduct the said Grand Jury proceedings which resulted in the finding of the indictment in this case.

This affidavit is in support of an application to the Court to vacate [fol. 28] the order of arrest by habeas corpus herein upon the ground, among others, that the indictment was found under the direction of the said Fletcher Dobyns, who was not specifically, or otherwise, directed by the Attorney General to conduct the Grand Jury proceedings herein, and that his appearance before the Grand Jury in the Southern District of New York was wholly unauthorized and

contrary to law and rendered illegal and void any indictment so returned by said Grand Jury, including the indictment found against this deponent, in which he was arrested in the Southern District of New York on the 6th day of February, 1923, as aforesaid.

I further submit that being in the legal custody of my said Washington bondsman, and on my way to attend the trial of my case, as aforesaid, I was immune and privileged from arrest while I was passing through the Southern District of New York to attend court, as aforesaid, in the District of Columbia.

I further specifically reply to the return of the Marshal as follows:

(a) In reply to the first paragraph of the said return I affirm that the said petition for writ of habeas corpus herein was sufficient to authorize the issuance of the writ, and, furthermore, that the additional facts herein stated support and justify the same under the act of February 5, 1867, Ch. 28, 14 Stat. L. 385, which reads as follows:

"The Petitioner or party imprisoned or restrained may deny any of the facts set forth in the return or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended by leave of the court or justice or judge before or after the same are filed, so that thereby the material facts may be ascertained."

And I aver and state the fact to be that the additional facts herein [fol. 29] stated and the suggestions herein contained were and are made by leave of the Court, specifically granted, when this matter came on for argument on the 17th day of February, 1923, before Hon. Francis S. Winslow, United States Judge.

(b) I deny that the indictment found against me by a Grand Jury of the United States of America for the Southern District of New York, as set forth in the second paragraph of the return of said Marshal, was properly found or that the same constituted a legal or valid indictment against me and I aver that the same was and is illegal for the reasons hereinbefore set out.

(c) I admit that a bench warrant was issued out of this Court, as stated in the paragraph marked three of the return of said Marshal for my apprehension, and I aver the fact to be that upon said bench warrant I was arrested for removal in the District of Connecticut and was discharged from said arrest and said removal denied by Hon. Edwin S. Thomas, United States Judge, as hereinbefore set out.

I admit that I was taken into custody in the Southern District of New York, but I deny that said bench warrant or any process issued upon the indictment found against me in the Southern District of New York was sufficient or legal authority for my detention or arrest, and I deny that the same conferred any authority or right

upon the Marshal of the Southern District of New York to detain me or restrain me of my liberty.

[fol. 30] d. I deny that I was "duly arraigned" before the United States District Court in the Southern District of New York on the 6th day of February, 1923, and I aver that I was brought before said Court entirely against my will and in violation of my constitutional rights and in violation of the due process clause of the Constitution of the United States. I deny that I entered any plea whatsoever at the time of said pretended arraignment, and I deny that bail in the sum of $15,000 was fixed pending my trial upon the said indictment, and I aver the fact to be that my bail of $15,000 was given upon my application to be discharged by virtue of a writ of habeas corpus.

(e) I aver that I was and am detained and restrained of my liberty wholly in violation of my constitutional and legal rights and by virtue of illegal process and that the same constitutes an abuse of process and an unlawful restraint of my liberty, wholly without jurisdiction or authority therefor.

Wherefore the petitioner, Harry F. Morse, prays this Honorable Court that the writ of habeas corpus herein may be sustained and that my arrest and detention may be vacated and set aside, and that I be discharged from custody or detention, and that my bail be exonerated and discharged and that the entire proceedings resulting in the restraint of my liberty be declared to have been improper, illegal and in violation of my constitutional rights as guaranteed to me by the Constitution of the United States and the amendments [fol. 31] thereto.

This affidavit is filed with the express permission of the Court.

Harry F. Morse.

Sworn to before me, this 23rd day of February, 1923. Carrie L. Edgar, Notary Public. My Commission expires Feb. 1st, 1928. (Seal.)

[fol. 32] Jurat showing the foregoing was duly sworn to by Harry F. Morse omitted in printing.

[fol. 33] EXHIBIT "A" TO AFFIDAVIT OF HARRY F. MORSE

UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

UNITED STATES

vs.

HARRY F. MORSE

Edward L. Smith, Esq., Hartford, Conn., for United States.
Nash Rockwood, Esq., and Charles Tressler Lark, Esq., New York City, and Carl Foster, Esq., Bridgeport, Conn., for Defendant.

THOMAS, D. J.:

This matter is before the Court on a writ of habeas corpus resisting the removal of the defendant from the District of Connecticut to the Southern District of New York.

The defendant was apprehended in the State of Connecticut, where he resides, and taken before a United States Commissioner upon a complaint verified by the United States Attorney for this District charging him with a violation of Section 37 of the Penal Code. Attached to the complaint, or information, which was upon information and belief only, was a certified copy of an indictment returned against the defendant and twenty-three others by a Grand Jury in the Southern District of New York in April, 1922, accusing them of conspiring to use the mails to defraud.

Removal of the defendant from Connecticut to the Southern District of New York for trial was sought in the proceedings before the Commissioner. At the preliminary hearing, after motions to dismiss had been made and denied, the Government offered in evidence [fol. 34] a certified copy of the indictment together with testimony identifying the defendant and thereupon rested its case without further proof. The defendant then moved for dismissal alleging that the indictment was fundamentally defective and that the local Connecticut practice had not been followed as required by Section 1412 of the Federal Code. (R. S. §1014.) This motion was denied and the defendant presented oral and documentary evidence to the Commissioner to rebut the presumption of probable cause, which testimony was taken at great length. At its conclusion the Commissioner denied further motions to dismiss and reserved decision, subsequently finding that there was probable cause to believe the defendant guilty of the crime charged and committing him for removal to the custody of the Marshal. Application for writs of habeas corpus and certiorari were made and granted in behalf of the defendant who was admitted to bail pending decision.

The Marshal has made return to the writ of habeas corpus alleging that he is holding the defendant pursuant to the order of commitment of the Commissioner and the Commissioner has made return to this Court of all of his proceedings including the evidence taken before him.

The Defendant has demurred to the returns of the Marshal and Commissioner averring an entire lack of jurisdiction in the proceedings and an absence of probable cause.

Prior to the argument upon the return of the writs of habeas corpus and certiorari the United States Attorney made an oral request for an order for the removal of the defendant to the Southern District of New York and by consent of counsel, with the approval of the Court, all motions were argued and will be considered and decided together.

The practice upon applications of this character is governed by [fol. 35] section 1412 of the Federal Code (R. S. 1014) which reads, so far as is here applicable:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * *

* * * * * * *

And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the Judge of the district where such offender or witness is imprisoned, seasonable to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

At the very outset, it is urged for the defendant that the proceedings before the Commissioner were not conducted "agreeably to the usual mode of process against offenders" in criminal cases in the State of Connecticut in that (a), the accused was not confronted with the witnesses against him,—(b), that the counsel for the Government was himself a witness for the complainant in testifying to the identification of the defendant, and (c), that counsel in his summation to the Commissioner improperly commented upon the fact that the defendant had not taken the stand as a witness in his own behalf. In support of these contentions, reference is made to State v. Ferrone, 96 Conn. 160; State v. Ferrone, 97 Conn. 258; Nanos, et al. v. Harrison, 117 Atl. Rep. 803; Section 6634, General Statutes of Conn.

That the local state practice is to be followed in removal proceed- [fol. 36] ings before a U. S. Commissioner under R. S. 1014 quoted supra, is established by numerous decisions, In U. S. v. Rurcede, 220 Fed. 210 the Court sustained a writ of habeas corpus and discharged the defendant because the preliminary removal proceedings before the Commissioner did not conform to the practice established

in New York by the Code of Criminal procedure for proceedings before a magistrate and cited in support of the conclusion reached, U. S. v. Greene, 100 Fed. 941, where the Court, Judge Addison Brown, following the opinion of Mr. Justice Curtis of the Supreme Court of the United States in U. S. v. Rundlett, 2 Curt. 41, Fed. Cases No. 16, 208, held that it was the effect of Section 1014 to assimilate all proceedings for holding accused prisoners to answer before a court of the United States to proceedings had for similar purposes by laws of the State where the proceedings might take place. In Hastings v. Murphie, 219 Fed. 83 a similar rule was invoked in Massachusetts, and a recent decision in point is U. S. v. Maresca, 266 Fed. 713, at page 721.

In Safford v. U. S. 252 Fed. 471, Judge Ward, speaking for the Circuit Court of Appeals for this Circuit, said, page 473:

"The defendant contends that the language 'agreeably to the usual mode of process against the offenders in such states' means only 'the process itself, such as warrants, commitments, etc., as distinguished from procedure, which may embrace hearings.' We think it means procedure, and the Code of Criminal Procedure of the State of New York (sections 188-220) provides for just such examination. United States v. Dunbar, 83 Fed. 151; Cohen v. United States, 214 Fed. 25; United States v. Greene, 100 Fed. 941."

We have in Connecticut no code of criminal procedure but follow the common law. The defendant offered in evidence and proved by a former Judge of the City Court of Bridgeport who had acted [fol. 37] as such for twelve years, and a former City Attorney in the same Court, who had been such for almost fifteen years, that the procedure in Connecticut called for more than the information and identification on a plea of not guilty before the State established a prima facie case. It was conclusively shown that that State must produce witnesses to make out its prima facie case, and that the Court would review all of the evidence offered, whether it was offered by the State or the defendant, to determine whether there was sufficient evidence to justify the finding of the existence of probable cause to hold the accused for the Superior Court. It further appeared that if the State offers in evidence the information and proves the identity of the accused and then rests, offering no oral testimony, that the defendant is entitled to a discharge.

While attaching substantial importance to these contentions they are, nevertheless, overshadowed by the more vital contentions of the non-existence of jurisdiction and probable cause, upon the affirmative determination of which must ultimately rest the Government's right of removal.

The indictment was prima facie evidence of the existence of probable cause, but that it was not conclusive is decided in Hastings v. Murchie, 219 Fed. 83, at page 88, Beavers v. Henkel, 194 U. S. 24; U. S. v. Yount, 267 Fed. 861; Tinsely v. Treat, 205 U. S. 20; Gayon v. McCarthy, 252 U. S. 171, 173.

In Beavers v. Henkel, Mr. Justice Brewer said, on page 85:

"It is sufficient for this case to decide, as we do, that the indictment is prima facie evidence of the existence of probable cause. This is not in conflict with the views expressed by this Court in Greene v. Henkel, 183 U. S. 249."

In the Yount case, supra, Judge Thompson said, page 862:

[fol. 38] "The Supreme Court has mapped out with clearness the procedure under section 1014 of the Revised Statutes (Comp. St. Sec. 1674), where it is sought to remove a defendant from the district where arrested to that where the offense is triable. It is distinctly ruled that, while the indictment constitutes prima facie evidence of probable cause, it is not conclusive, and evidence may be offered by the defendant tending to show that no offense triable in the district to which removal is sought has been committed; that in such a proceeding the function of the judge is not ministerial but judicial."

If the indictment does not charge the commission of a penal offense under the laws of the United States, then all jurisdiction to commit the defendant for removal is at an end. Tinsely v. Treat, supra, was evidently intended by the Supreme Court to prescribe a general rule of procedure governing matters of this character. There the matter came before the Supreme Court because the Commissioner and Court would not allow the defendant to offer evidence to rebut the presumption of the existence of probable cause. On page 28, Chief Justice Fuller, writing the opinion, said:

"At the hearing before the Circuit Court, in addition to the record of the proceedings before the District Judge, an offer was made to prove by witnesses the facts set forth in the petition, but the court did not admit the same, because it was held that the certified copy of the indictment, with proof of the identity of the party accused, sufficiently established the existence of probable cause.

In other words, the indictment was in effect held to be conclusive. The Circuit Judge said, it is true, that probable cause must be shown in order to obtain a removal, but he held that inasmuch as the copy of the indictment alone was regarded as sufficient evidence of probable cause in Beavers v. Henkel, 194 U. S. 73, it was sufficient in the present case. In that case, however, no evidence was introduced to cover the prima facie case made by the indictment except that evidence was offered as to what passed in the grand jury room and rejected on that ground and not because it went to the merits."

Then in commenting on Sec. 1014, the learned Chief Justice spoke as follows, page 29:

[fol. 39] "Obviously the first part of this section provides for the arrest of any offender against the United States wherever found and without reference to whether he has been indicted, but when he has

been indicted in a District in another State than the District of arrest, then, after the offender has been committed, it becomes the duty of the District Judge, on inquiry, to issue a warrant of removal. And it has been repeatedly held that in such cases the judge exercised something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same, 'The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions.' Mr. Justice Jackson, then Circuit Judge, Greene's case, 52 Fed. Rep. 104. In the language of Mr. Justice Brewer, delivering the opinion in Beavers v. Henkel, 194 U. S. 73; 83;

It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the Government and an individual the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting section 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial act."

And again on page 31, the Court, in a general review of the cases, took occasion to say:

[fol. 40] "It was held in Beavers v. Henkel, 194 U. S. 73; Benson v. Henkel, 198 U. S. 1; Hyde v. Shine, 199 U. S. 62, as well as Greene v. Henkel, supra, that an indictment constituted prima facie evidence of probable cause, but not that it was conclusive.

We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under section 1014."

In general it may be said that the policy of the law is to protect the individual against any invasion of the rights, one of the most important of which is to be immune from criminal prosecution if not legally accused. In a long line of federal decisions the indictment in removal proceedings while admittedly prima facie evidence of the existence of probable cause is given only the effect and strength of an affidavit or information. As illustrative of the current of judicial authority upon this proposition may be cited, In re Dana, 68 Fed. 886; U. S. v. Greene, 100 Fed. 941; U. S. v. Campbell, 179 Fed. 762.

Upon the demurrer of some of the defendants in the instant case, the indictment was upheld in the Southern District of New York as being "in usual form," but upon a careful consideration and analysis of it I cannot reach the same conclusion and cannot believe that the objections which have been argued in behalf of the defendant in this jurisdiction were called to the attention of the Court in the Southern District of New York. The indictment divides the twenty-four indicted defendants into the classes designated as sixteen "principal defendants" and eight "other defendants." Clause B states that the alleged scheme to defraud was to be devised by the sixteen "principal defendants" alone, and the "other defendants," according to Clause A were to aid, abet and counsel the "principal defendants" in "accomplishing the object of the conspiracy." The [fol. 41] indictment, therefore, clearly specifies two classes of defendants engaged in different acts but with a common purpose and is thus brought within the condemnation of Wilson v. U. S. 190 Fed. 428, where Judge Noyes, speaking for the Circuit Court of Appeals, said, page 436:

"We do not question the correctness of the proposition stated in behalf of said defendant that when certain persons combine to perform certain acts and some of them combine with others engaged in totally different acts, though all may have a similar general purpose in view, it is error to join them in an indictment."

Furthermore, Clause D, in terms limits the making of the fraudulent representations and the dissipation and conversion of assets to the principal defendants.

Again, while there is an allegation that the U. S. Steamship Company controlled the business and affairs of the several corporations referred to in the indictment as the "underlying corporations," there is an entire absence of averment that the "principal defendants" controlled either the stock ownership or the Board of Directors of the U. S. Steamship Company, or that it would have been possible for them to have wasted, dissipated, or converted the assets of the U. S. Steamship Company. There is a general allegation that the "principal defendants" were "actively engaged as officers, directors, attorneys, agents and employees, in the conduct and management of the business and affairs of the U. S. Steamship Company," but no allegation that they directly or indirectly controlled the corporate acts of the United States Steamship Company.

As the indictment is for conspiracy to use the United States mails to defraud, the intention to commit the offense prohibited by Section 215 of the Penal Code must be averred and under the decision of the Supreme Court in U. S. v. Young, 232 U. S. 155, there is grave [fol. 42] doubt if such intention is sufficiently alleged.

In the consideration of this application for removal where the indictment is to be treated as an affidavit, the overt acts must show that they were committed in furtherance of the principal offense charged. Anderson v. U. S. 260 Fed. 557; U. S. v. Dowling, 278 Fed. 630; and it should be averred therein that the letters or matter

deposited in the mails were "to be sent or delivered by the Post Office establishment of the United States." Tested by these rules it seems to me that all of the overt acts relating to mailing are clearly defective as none of these overt acts contain any allegation that the matter mailed or deposited in the Post Office was "to be sent or delivered by the Post Office establishment of the United States." As to overt acts numbered 2, 3, 4, 5, 8, 9, 10, 11, 12, 21, 22, 23, 24, 25 and 26, it is not even alleged that the matter mailed was stamped so that the machinery of the United States Post Office department would be legally set in motion. As to overt acts numbered 7-19 and 20, which contain averments that United States postage stamps were affixed to the matter mailed, there is no allegation that said postage was legally sufficient in amount, which although a somewhat technical omission, is, nevertheless, indicative of the lack of care and precision in the drawing of the indictment, particularly in the allegations respecting the overt acts.

And further,—the defendants are not directly charged with having conspired to violate Sec. 215 of the Penal Code, but the charge is that they conspired

"to commit divers, to-wit, one thousand offenses against the United States, of the kind under the circumstances, in the manner and by the means and methods following, that is to say:"

[fol. 43] Then follows the general allegations as to the connection of the "principal defendants" with the United States Steamship Company and the underlying corporations; that the "other defendants" aided, abetted and counselled the "principal defendants"; that the "principal defendants" were to devise a scheme to defraud; that all of the defendants were to engage in the mailing of one thousand letters and papers for the purpose of executing a fraudulent scheme and that the "principal defendants" were to make certain fraudulent representations in order to induce the public to buy the shares of the United States Steamship Company. Other alleged fraudulent acts of the "principal defendants" are also averred. The conspiracy to mail one thousand letters of a fraudulent character would not constitute a criminal act under Section 215 without the previous formation of a scheme or artifice to defraud. Had the indictment charged directly the formation of a conspiracy to commit an offense against the United States by violating Section 215 of the Penal Code, a different case would be presented. In the respect last mentioned the indictment is ambiguous and involved and, if not a fatal defect, does not clearly apprise the defendants of the offense which they are called upon to meet. An indictment should charge a criminal offense in unmistakable terms, free from doubt, and not resting upon inference. The general rules pertinent here are well summarized by Judge Clayton in U. S. v. Dowling, supra. At page 633 he said:

"The settled rules governing here are that a crime should not be charged by way of inference, but directly: the indictment should set forth accurately every ingredient of which the offense is com-

posed; if the crime is made up of acts and intent, these must be [fol. 44] set forth forth with reasonable particularity as to the time and place; the accused should be informed by the indictment as to the precise nature of the charge against him, to enable the court to say as to whether the facts set forth are sufficient in law to support a conviction; and the test is whether the indictment contains every element of the offense and sufficiently informs the defendant of what he must meet, and also whether it will enable him to sustain a plea of former acquit-al or conviction." Citing cases.

For all of the reasons stated the conclusion seems imperative that the indictment does not charge the defendants with a violation of the criminal law of the United States.

But wholly aside from the legal insufficiencies of the indictment, I find that its evidentiary force as prima facie proof of the existence of probable cause herein, was overcome by the evidence offered in behalf of the defendant. It must be remembered that the Government's whole case consisted of the introduction of the indictment and proof as to the identity of this defendant. There the Government rested. This established a prima facie case in the absence of other evidence. Thereupon the defendant offered in evidence the testimony of witnesses to rebut the existence of the prima facie case and that testimony covers some three hundred pages of evidence. At the conclusion of that testimony the Government offered no evidence to refute the testimony offered in behalf of the defendant or to disprove any part of it.

The indictment rests principally upon allegations to the general effect that the conspiracy contemplated a defrauding of the public by inducing the purchase of stock in the United States Steamship Company through the fraudulent representations that the underlying corporations were

[fol. 45] "respectively going concerns owning very valuable ships and shipbuilding properties, and having valuable contracts for the construction, repair and operation of ships and the carrying of freight; that these contracts would bring great sums of money in earnings and dividends to owners and holders of the capital stock of said underlying companies, including said United States Steamship Company, and that the value of said shares of said underlying corporations would thereby be greatly enhanced; which said pretenses, so to be made by said principal defendants to said persons to be defrauded would be false and fraudulent, etc."

The testimony offered in behalf of the defendant before the Commissioner shows that all of these allegations, if made, were true and well founded and that the averments of the indictment relative to fraudulent representations are based upon an assumption of facts wholly contrary to the fact, at least, so far as the evidence adduced shows. The United States Steamship Company and all of its subsidiary companies were by the evidence shown to have not only been going concerns, but all of the underlying corporations were

the owners and operators of valuable properties. At Groton in this District, was located the extensive plant of the Groton Iron Works representing an investment of some millions of dollars and employing a large force of laborers, mechanics and shipbuilders, actually engaged in the construction of ships for the Government. A court will take judicial notice of the files in civil cases pending in its own Court. There is in fact, pending in this District, an action at law brought by the Trustee in Bankruptcy of the Groton Iron Works to recover from the United States Shipping Board Emergency Fleet Corporation a sum alleged to be due the plaintiff of some millions of dollars, and an extended argument on the pleadings of that case, already had, shows that there was, in fact, certain contracts of [fol. 46] magnitude executed between the Groton Iron Works and the Fleet Corporation. And the evidence before the Commissioner also showed that at Alexandria, Virginia, there was the costly shipbuilding plant of the Virginia Shipbuilding Company also engaged in Government work and with thousands of operators and employees. The evidence also shows that the Hudson Navigation Company was the owner and operator of valuable ships upon the Hudson River with terminals at New York and Albany and a large capital investment. That the United States Transport Company had not been incorporated at the time of the formation of the alleged conspiracy, although it is otherwise alleged in the indictment. The evidence further shows that the Groton and Virginia Companies had existing contracts with the Government for the construction of freight ships exceeding the sum of thirty million dollars. The United States Transport Company had large freight contracts with shippers both in this and foreign jurisdictions. So that in any view of the evidence adduced it could not be successfully urged before a trial jury that the United States Steamship Company, the Groton Iron Works, the Virginia Shipbuilding Corporation, the United States Transport Company, and The Hudson Navigation Company were not going concerns,—that they did not own valuable properties,—that their contracts with the Government for the construction of ships were not of considerable prospective value,—that their freight carrying contracts were not of present and future value, and that there did not exist valid business reasons upon which to base the belief and statement that the earnings of these companies from existing contracts and prospective profits would justify the declaration [fol. 47] of dividends. Furthermore the evidence refutes the allegations in the indictment to the effect that the "principal defendants" had been guilty of fraudulent misconduct in conducting the affairs of the business of the United States Steamship Company or of the underlying corporations. The salaries paid to the defendants seem to have been reasonable and within the power of the corporation to authorize. The evidence negatives the suggestion that the assets of the various corporations were wasted or dissipated by the defendants and the letter sent out to stockholders by the defendant Rupert M. Much, who was President of the United States Steamship Company, instead of containing mis-statements of fact

to delude and defraud prospective purchasers of stock, seems to have been a frank and candid statement of the financial and physical condition of the Company. The defendants seem to have been justified in their belief that the Government contracts would yield substantial profits. The companies were all prosperous, going concerns and there was nothing to indicate that future difficulties would be encountered in the matter of the Government contracts or that there would be any litigation concerning them resulting in the financial embarrassment of the corporation and the consequent depreciation in the value of their respective properties and capital stock. If the allegations in the indictment concerning fraudulent representations do not rest upon any facts, they become and are mere naked conclusions and cannot be made the basis of a criminal prosecution.

Probable cause, in a removal proceeding must mean more than mere inference or suspicion. It must contemplate well founded judicial belief in the guilt of the accused or that there is at least some valid reason upon which to base a belief in criminality. The removal of one accused of crime from the jurisdiction of his domicile [fol. 48] to another jurisdiction for trial calls for a discriminating degree of judicial discretion. As has been noted, the order of removal is not a ministerial act. It is a judicial act. If the indictment obviously asserts as facts matters which did not or could not have existed and such appears from evidence, or if it rests upon the mere conclusion of the pleader, it is ineffective as proof of the evidence of probable cause.

The burden of proof was upon the defendant to overcome the prima facie case established for the Government by the indictment and proof of identity, and when this has been done by the affirmative proof, as here, the burden then shifted and was upon the Government which elected, however, to stand upon the indictment and the identity without the presentation of any evidence whatever in rebuttal. The case, then comes before me with the Government's contentions, upon the facts, successfully controverted sufficiently so to negative the existence of probable cause.

As the Government's application for removal and the defendant's motion for discharge by habeas corpus were, by consent, consolidated and have been heard together I have reached the conclusion that on this record there is no probable cause to believe the defendant guilty of the crime attempted to be charged in the indictment.

For all the reasons herein stated the application for a warrant of removal to the Southern District of New York is denied and the defendant's application for discharge upon habeas corpus is granted and his bond released.

The writ must be sustained and the defendant discharged, and it is So ordered.

January 25, 1923

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

Appearances: Rockwood & Lark, (Nash Rockwood of Counsel) Attorneys for Petitioners; William Hayward, United States Attorney (John E. Joyce, Assistant United States Attorney), for the Government.

WINSLOW, D. J.:

The petitioners seek release by habeas corpus from the custody of the United States Marshal for the Southern District of New York. They were arrested on February 6, 1923, within this district, by the Marshal upon a warrant issued out of this court July 19, 1922 directed to said Marshal. The indictment on which the warrant was issued was filed herein April 27, 1922. It charges the petitioners and twenty-two others with conspiring to use the mails in a scheme to defraud. The petitions on which the writs were issued urge that their restraint is illegal because the indictment is invalid, and does not state facts sufficient to constitute a crime.

[fol. 50] The return sets forth the finding and filing of the indictment and the issuance of the bench warrant. The petitioners traverse the return and set forth additional grounds of attack, in substance:

(1) That the petitioners, at the time of their arrest in this district, were en route to the District of Columbia to attend the trial of an indictment pending against them and others in that district;

(2) That the decision of the District Judge in the District of Connecticut, petitioners' home district, in removal proceedings brought to secure the removal of the petitioner, Harry F. Morse, from that district to the Southern District of New York, was to the effect that the indictment was invalid and insufficient;

(3) That an unauthorized person was in attendance before the Grand Jury which returned the indictment in this district.

The material facts necessary to a decision are not disputed. There are questions of law, however, requiring consideration.

The petitioners contend that they were immune from this particular arrest for the reason that, when apprehended, they were en route through this district to the District of Columbia, there to answer another indictment and attend their own trial in that jurisdiction. The defendants, at the time of their arrest on the train, were under indictment returned in this district charging them with a felony. They were arrested by a duly authorized officer of the United States acting pursuant to a warrant duly issued out of this Court.

It is a common law rule that suitors and witnesses while going

to, attending at and returning from Court are exempt from civil process. 5 Corpus Juris, 565; Larned v. Griffin 12 Fed. 590. The [fol. 51] reason for this rule has been generally recognized as the desire of the Courts to induce suitors to present their controversies for determination and to protect them from being subjected to service of process in a civil suit which could not otherwise reach them, except for their presence in the jurisdiction for the purpose of attending to the particular controversy. This immunity, under the common law rule, does not, however, extend to one while in custody under criminal process or while attending or returning from his trial on a criminal charge. 3 Cyc. 923.

The petitioners are not privileged from criminal arrest while passing through this jurisdiction to attend a criminal trial, nor yet were they privileged from civil process, even in the District of Columbia or in this jurisdiction, while en route for the purpose indicated. The common law rule is intended to protect suitors voluntarily coming into and going from the jurisdiction.

Scott v. Curtis, 27 Vt. 762.
Netograph v. Scrugen, 197 N. Y. 277, 381.
Ex parte Levi, 28 Fed. 651.

The next question to be considered is the contention of the petitioners that this Court could not or should not assume jurisdiction of the petitioners because they were obligated to appear in the District of Columbia to stand trial on indictments there pending. This contention is without merit. While it is true that it is a well recognized rule of comity that where two Courts have concurrent jurisdiction of the same subject matter, the one which first assumes such jurisdiction holds it to the exclusion of the other until such jurisdiction is exhausted,—that rule has no application to criminal process [fol. 52] where the defendant is accused of different crimes in different jurisdictions. The Supreme Court of the District of Columbia has jurisdiction of certain offenses committed within its territory and, presumptively, these defendants were en route to answer the charges in that jurisdiction. In like manner, this Court has jurisdiction of certain offenses committed within its territorial limits and this crime, for which the petitioners are indicted as it appears from the record, is separate and distinct from the crime charged in the District of Columbia. The Court of neither jurisdiction can restrain the other from proceeding on the respective indictments. The petitioners, pending the determination of the applications herein, were admitted to bail and thereby they were free to come and go, only bound to appear in the jurisdictions when required.

Peckham v. Henkel, 216 U. S. 482.
Ex parte Marrin, 164 Fed. 631.

The only remaining question to be considered is the contention of the petitioners that in certain removal proceedings in the District of Connecticut, on the pending indictments, removal to this district was refused on various grounds. Neither the sufficiency of the in-

dictment nor the regularity of the proceedings before the Grand Jury are proper matters of inquiry on habeas corpus.

Ex parte Parks, 93 U. S. 18.
Ex parte Siebold, 100 U. S. 371.
Collins v. Loisel, 262 U. S. 427.

The petitions and writs of habeas corpus will be dismissed.

Francis A. Winslow, U. S. District Judge.

June 19, 1924.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING WRIT OF HABEAS CORPUS—Filed June 26, 1924

The writ of habeas corpus heretofore allowed to the above named Harry F. Morse having duly come on to be heard before the Hon. Francis A. Winslow, District Judge, at a term of this Court, held on the 26th day of June, 1924, and after hearing Nash Rockwood, of counsel for petitioner, in support of said writ, and John E. Joyce, Esq., Assistant to the United States Attorney, in opposition thereto, and due deliberation having been had thereon, on motion of William Hayward, United States Attorney, it is

Ordered that said writ be and the same hereby is dismissed, and it is

Further ordered, that the said Harry F. Morse surrender himself into the custody of the United States Marshal for the Southern District of New York on or before the 10th day of July, 1924.

Enter.

Francis A. Winslow, United States District Judge.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 18, 1924

And now comes Harry F. Morse, by Nash Rockwood, his attorney, and in connection with his petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the proceedings in the above entitled cause in said District Court, error has intervened to his prejudice, and this defendant here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned, and in dismissing

his petition and remanding him into custody, of the Marshal of the Southern District of New York. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the 5th amendment of the Constitution of the United States.

2. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody.

3. The Court erred in not holding and finding that the arrest of your petitioner while he was en route to Washington as defendant in a criminal case there being actually tried against him by the [fol. 55] United States, was illegal and void and in violation of the Constitution of the United States and the due process clause of the said Constitution.

4. The Court erred in not holding and finding that your petitioner was immune from arrest in the Southern District of New York at the time when he was passing through said District en route to his trial in the City of Washington, District of Columbia.

5. The Court erred in not holding and finding that your petitioner while enlarged in bail in the District of Columbia and being actually on trial there, was at the said time immune and privileged from arrest in the Southern District of New York.

By reason whereof, this petitioner and appellant prays that said judgment may be reversed and that he be ordered discharged.

July 10, 1924.

Nash Rockwood, Attorney for Petitioner and Appellant.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 18, 1924

And now comes Harry F. Morse and respectfully represents that on the 26th day of June, 1924, a judgment was entered by this Court dismissing his petition for habeas corpus, and remanding him to the custody of a Marshal of the Southern District of New York.

And your petitioner respectfully shows that in said record proceedings and judgment in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Therefore, your petitioner prays that an appeal may be allowed him from said judgment to the Supreme Court of the United States,

and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal in the said Court.

July 10, 1924.

Harry F. Morse, by Nash Rockwood, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 18, 1924

On reading of the petition of Harry F. Morse, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal as prayed for be and is herewith allowed.

And it appearing to the Court that a citation was duly served as provided by law, it is

Ordered that petitioner be admitted to bail pending the final determination of this appeal in the sum of $5,000. The appeal to operate as a supersedeas until the further order of this Court, unless it shall appear to the Court that the perfection and argument of said appeal have been unduly delayed. If not promptly perfected and argued the said Appellee may move upon five days' notice to the Appellant for the vacation of said supersedeas.

Cost bond on appeal is hereby fixed in the sum of $100.

Further ordered upon consent of counsel in open court that this order be entered nunc pro tunc as of July 10, 1924.

Francis A. Winslow, U. S. D. J.

[File endorsement omitted.]

[fols. 58 & 59] CITATION—In usual form, showing service on Wm. Hayward; filed July 18, 1924; omitted in printing

[fol. 60] [File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION EXTENDING TIME

It is hereby stipulated, that the time of the appellant to comply with citation, and cause record on appeal herein to be filed in the

office of the Clerk of the United States Supreme Court, be extended up to and including August 20th, 1924.

Dated New York, August 5th, 1924.

Wm. Hayward, U. S. Attorney, Attorney for the Appellee.
Nash Rockwood, Attorney for Appellant.

So Ordered: Alex. Gilchrist, Jr., Clerk.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York this nineteenth day of August, in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the said United States the one hundred and forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the United States, Southern District of New York.)

Endorsed on cover: File No. 30,563. S. New York D. C. U. S. Term No. 598. Harry F. Morse, appellant, vs. The United States of America. Filed August 20, 1924. File No. 30,563.

APPELLANTS

BRIEF

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 597.

BENJAMIN W. MORSE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

Appeal by Benjamin W. Morse from Judgment of the District Court of the United States for the Southern District of New York, Entered June 26, 1924, Dismissing His Application for Release by Habeas Corpus and Remanding Him to the Custody of the Marshal of the Southern District of New York.

BRIEF FOR APPELLANT.

NASH ROCKWOOD,
Attorney for the Defendant, Benjamin W. Morse, 527 Fifth Avenue, Borough of Manhattan, New York City.

CHARLES T. LARK,
Of Counsel.

DECEMBER 1, 1924.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

INDEX.

CASES CITED.

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BRIEF FOR APPELLANT.

Statement of Procedure.

On February 6, 1923, while *en route* through New York from his residence in Massachusetts to attend his trial upon criminal charges pending against him in the Supreme Court of the District of Columbia, the appellant was forcibly re-

moved from the train at New York City by the marshal of the Southern District of New York, acting under authority of a bench warrant issued upon an indictment found in said District charging the appellant with the crime of conspiracy.

Appellant, contending that his arrest was illegal, applied for and procured a writ of *habeas corpus* and demanded immediate discharge from custody.

The marshal of the Southern District of New York filed a return to the writ, averring, in substance, that the arrest was made by virtue of a bench warrant issued upon an indictment filed in the Court on April 27, 1922 (fols. 4-6).

With the permission of the Court, the appellant filed an additional affidavit in support of his application for discharge and as a traverse and reply to the return of the marshal, verified February 23, 1923 (fols. 6-32), the appellant was produced before Hon. Francis A. Winslow, United States District Judge for the Southern District of New York, and admitted to bail pending the determination of his application by *habeas corpus,* in the sum of fifteen thousand dollars ($15,000), which was furnished. Judge Winslow subsequently, on July 19, 1924, dismissed the writ of *habeas corpus* (fols. 53-54) and filed an opinion (fols. 49-53). The appellant filed five assignments of error, averring that his arrest and detention was in violation of his rights under the Constitution of the United States and the due process clause of the Constitution (fols. 54-56), and presented his petition for appeal to the Supreme Court of the United States (fols. 56-57), which was allowed (fols. 57-61), citation served, appeal to this Court duly perfected, and bail fixed upon appeal in the sum of five thousand dollars ($5,000), the appeal to operate as a supersedeas until the further order of the District Court.

Statement of Facts.

The facts are undisputed and are substantially as follows:

In January, 1922, the appellant was indicted by two separate indictments in the Supreme Court of the District of Columbia charged with having conspired to defraud the United States and to commit offenses against the United States in the matter of the alleged cheating and defrauding of the Fleet Corporation. The defendant was arraigned in the District of Columbia, pleaded not guilty, and, after the disposition of preliminary motions, admitted to bail and the trial of the indictments upon the merits was *peremptorily* set by Hon. Wendell P. Stafford, Justice of the Supreme Court of the District of Columbia, for trial in the said Supreme Court at 10 o'clock a. m. on February 6, 1923.

In April, 1922, the defendant was also indicted by a Federal grand jury in the Southern District of New York charged with having conspired to violate the provisions of Section 37 and Section 215 of the Federal Penal Code in the alleged fraudulent use of the United States mails. At the time of the indictment in New York a codefendant, Harry F. Morse (also appellant here in case No. 598), was in Connecticut, where he resided, and the appellant Benjamin W. Morse was in the State of Massachusetts, where he resided. The Government instituted removal proceedings under Section 1014 of the Revised Statutes in both the Massachusetts and Connecticut jurisdictions to remove the said respective defendants to New York for trial.

In Connecticut, removal proceedings for the removal to New York of Harry F. Morse were instituted before a United States Commissioner, who, after hearing oral testimony

comprising several hundred typewritten pages of testimony and much documentary evidence, decided in favor of the Government and ordered the appellant Harry F. Morse committed to the custody of the marshal for removal. Upon this hearing the Government introduced evidence and cross-examined witnesses. The said Harry F. Morse thereupon applied for a writ of *habeas corpus* to Hon. Edwin S. Thomas, United States Judge in the District of Connecticut, and the United States applied for a warrant of removal. By agreement of counsel, both proceedings in Connecticut—that is, the removal proceedings and the *habeas corpus* proceedings—were consolidated and heard together, and United States Judge Thomas, after a full hearing and examination of the evidence taken before the United States Commissioner, in an opinion held that the New York indictment did not charge the defendant Harry F. Morse (appellant in case No. 598) with the commission of a criminal offense under the United States laws; that there was no probable cause to believe the said defendant, Harry F. Morse, guilty of the commission of a crime; that the Commissioner had not followed the Connecticut practice in the hearing which was had before him, and that upon the entire record the petitioner, Harry F. Morse, was entitled to be discharged and to go without day. Judge Thomas also denied the application of the Government to remove said Harry F. Morse to the Southern District of New York, so that the proceedings in Connecticut had fully terminated prior to the second arrest in New York, both by the denial of the Government's application to remove the said defendant to New York and by the decision in favor of the defendant upon the writ of *habeas corpus*. The Government's removal proceeding in Connecticut was

based in part upon a bench warrant issued upon the New York indictment, which was the same bench warrant upon which the appellant was subsequently arrested in New York on the fifth day of February, 1923 (fols. 10-11).

The Massachusetts proceeding for the removal of this appellant Benjamin W. Morse was initiated before a United States Commissioner and, evidence having been taken at length, was pending before him undetermined on the fifth day of February, 1923, the appellant Benjamin W. Morse being there admitted to bail. On February 8, 1923, the Boston Commissioner, Hon. Wm. A. Hayes, 2d, handed down his decision finding that there was no probable cause and discharging the defendant Benjamin W. Morse from custody.

From the foregoing, the Court will note, as the first important and established questions of fact, that at the time of the second arrest of the appellant in New York, on the sixth day of February, 1923—

1. The appellant, Benjamin W. Morse, was under bail in Massachusetts in the proceedings pending before the Commissioner which were then undetermined, and was also under bail and in the custody of his bondsmen on the bond given in the Washington jurisdiction.

2. Harry F. Morse (appellant in case No. 598) had been fully discharged in Connecticut and was under bail and in the custody of his bondsman on the bond given in the Washington jurisdiction.

With the Washington case definitely and peremptorily set for trial on the morning of February 6, 1923, the defendants, Benjamin W. Morse and Harry F. Morse, boarded the Federal Express of the New York, New Haven & Hart-

ford Railroad at their respective places of residence (Benjamin W. Morse at Boston, Mass., and Harry F. Morse at New London, Conn.), and proceeded by this, "the usual, shortest and most direct route" to Washington. While they were asleep in their berths, at midnight, and as the train was *en route* to Washington, passing through New York City, they were summarily and forcibly taken from their Pullman berths on the train by the United States marshal and his assistants in the Southern District of New York and arrested upon the bench warrants which had been previously issued on the New York indictment, and which bench warrants had been used in connection with the previous arrest of both of the defendants in the removal proceedings, as aforesaid. The petitioner Benjamin W. Morse immediately sued out a writ of *habeas corpus* and subsequently enlarged the averments of his petition, as allowed by statute, and, with the permission of the Court, by an additional affidavit, so that the entire matter was brought before the District Court upon the petition for *habeas corpus*, the return of the marshal, and the traverse or additional affidavits filed by the petitioner. Hon. Francis A. Winslow, United States Judge, Southern District of New York, after a hearing, as aforesaid, dismissed the petition, remanded the petitioner, and allowed an appeal to this Court.

Law Points.

1.

THE ARREST OF THE DEFENDANT IN NEW YORK CITY WHILE PASSING THROUGH NEW YORK EN ROUTE TO TRIAL IN WASHINGTON WAS ARBITRARY, UNAUTHORIZED, ILLEGAL, AND CONSTITUTED A VIOLATION OF THE CONSTITUTIONAL SAFEGUARD OF "DUE PROCESS OF LAW."

The Fifth Amendment to the Constitution provides:

> "Nor (shall any person) be deprived of life, liberty or property without due process of law."

The process which is meant in this clause of the Constitution is Federal process.

In re Mahon, 34 Fed. Rep. 530.

The law applies to the District of Columbia and proceedings therein or related thereto.

Lappin vs. District of Columbia, 22 App. Cas. (D. C.) 76.

Wilson vs. McDonald, 265 Fed. Rep. 432.

Groot vs. Reilly, 266 Fed. Rep. 1008.

"Due process of law" in each particular case means such exercise of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of case to which the one in question belongs.

Cooley on Constitutional Limitations, page 434 (6th Edition, 1890).

U. S. vs. Yount, 267 Fed. Rep. 861.

In the Yount case, *supra*, it is held that:

> "'Due process of law' within constitutional Amendments Five and Fourteen is equivalent to 'the law of the land' *and is intended to protect the citizens against arbitrary action* and to secure to all persons equal and impartial justice."
> *Davidson vs. New Orleans*, 96 U. S. 97.
> *Missouri Pacific Railway vs. Humes*, 115 U. S. 512.

In the much-quoted case of *Columbia Bank vs. Oakley* (1819), 4 Wheat. 244; 4 U. S. (L. Ed.) 559, it is held:

> "The words 'due process of law' were intended to secure the individual *from the arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice."

In judicial proceedings "due process of law" must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law.

> *Burton vs. Plater*, 1893, 53 Fed. 904.
> *Ex parte McClusky*, 40 Fed. 74.
> *Ex parte Harlan*, 180 Fed. 119.

It is established by the foregoing that the sovereign cannot arbitrarily exercise summary power in total disregard of the rights of the individual and without consideration of the rights or parties to be affected. Due process of law and a consideration of existing rights is particularly needed in judicial proceedings, and the sovereign cannot arbitrarily

destroy those rights by mere summary action. In the case at bar the defendant had been absolutely and peremptorily ordered and *required* by the Court to be present before Judge Stafford and a jury in Washington for trial on the morning of February 6, 1923, under indictments there found by the sovereign. The case in Washington could not have proceeded to trial without the defendant; the charge was a felony, and his personal presence before the Court and jury had been definitely ordered and was required by law.

Lewis vs. U. S., 146 U. S. 372.
Hopt vs. Utah, 110 U. S. 579.
Diaz vs. U. S., 223 U. S. 442.

The action of the Government in arresting the defendant as he was passing through New York, and thereby preventing him from being present at his trial in Washington on February 6, 1923, could not under any consideration be held to have been—

> "according to those rules and forms which have been established for the protection of rights,"

referred to in the foregoing cases, but was, on the contrary, an absolute denial of the private rights of the individual to be present at the time that his case was to be called for trial in Washington. The petitioner was not a passenger upon an intrastate train; he had not voluntarily come into the jurisdiction of New York; he had previously resisted removal proceedings to the Southern District of New York and his resistance to the removal proceedings was actually pending undetermined before a United States Commissioner. The defendant, therefore, did not voluntarily come into the State of New York, but was merely *passing through New York*

en route to Washington, pursuant to the order of Justice Stafford, by "the usual, most direct, and shortest route" thereto. He was a passenger on an interstate car and train—the Federal Express. He did not leave the train when it arrived in New York, but was asleep in his berth when arrested. The appellant, having been peremptorily ordered to appear in Washington for trial, was not voluntarily within the State of New York, but he was obliged to pass through New York in order to reach Washington, unless he had traveled by water or by an unnecessarily circuitous route. He came from his place of residence and passed through New York for the sole purpose of reaching Washington, as directed by the Court. This was necessarily "a compulsory passing through New York" and has been so held in a somewhat similar case.

U. S. vs. Bridgeman, 24 Fed. Cas. 14645, 9 Biss. 221-223, 9 Rep. 74.

This is also the law of New York.

Sander vs. Harris, 14 N. Y. Suppl. 37.
Day vs. Harris, 14 N. Y. Suppl. 73.
Murphy vs. Sweezy, 2 N. Y. Suppl. 41.

There is no parallel in the suggestion made by counsel for the Government at the argument before Judge Winslow to the effect that if a defendant passing through Ney York stepped from the train and committed a crime at the station he could be arrested in New York. Nothing of that kind occurred or is involved in any way in this case.

Not only did the Government violate the constitutional rights of the defendants to "due process of law," but the "usual mode of process" was violated.

"Usual mode of process" applies to the procedure by which the offender may be arrested and imprisoned or bailed.

U. S. vs. Powloski, 270 Fed. Rep. 285.

In *U. S. vs. Baird,* 85 Fed. Rep. 633, a witness came into the State of New Jersey in response to a subpœna from a Federal Court. While in New Jersey he was arrested on State criminal process and was immediately released by the Court upon *habeas corpus* and the arrest vacated. Judge Kirkpatrick held:

> "It is further ordered that the said John J. Boyle be safely conducted back to the City of Philadelphia in the Eastern District of Pennsylvania from whence he came; and that the marshal of the United States for the District of New Jersey attend so that he shall have safe passage to the place from whence he came."

It was further held that Boyle, having been subpœnaed by the United States to attend in New Jersey as a witness and having left Pennsylvania for that purpose, was entitled to protection from arrest by the State authorities of New Jersey for any alleged offense before then charged to have been committed by him.

How much more definite should the protection be when both proceedings are conducted by the same sovereign, as in the case at bar, where we have the sovereign in one jurisdiction directing the defendant to appear and using the summary and arbitrary power of the Government in another jurisdiction to prevent him from appearing? It was known to the Government authorities in the Southern District of New York that the case of the appellant Benjamin W. Morse in Washington had been peremptorily set for trial for February

6, 1923, and it was known that he was *en route* to his trial. The sovereign, therefore, with full knowledge of the situation, detained and restrained the defendant in another jurisdiction, and thereby prevented his trial from proceeding and risked the forfeiture of his bail in Washington. Was this "due process of law" or was it a mere arbitrary exercise of the power of arrest without any consideration whatever for the rights of the defendant? Can this Court say that the arrest of the defendant was "orderly procedure," and that it was " in the ordinary manner prescribed by the law" and "according to those rules and forms which have been established for the protection of private rights"?

In *Chandler vs. Sherman*, 162 Fed. Rep., at page 19, it is held that—

> "A Federal Court has power to protect a litigant therein from seizure of his person by the authority of a State while in attendance upon the trial of his case."

If the power of the Federal Court could be used to protect a litigant from interference in a State Court, how much more should it be exercised in favor of a litigant in its own courts who is unfortunate enough to have proceedings brought against him by the sovereign in two jurisdictions.

Unreasonable and arbitrary exercises of power are illegal, violating the guarantee of due process of law, and persons deprived of liberty under such acts are entitled to be released by writ of *habeas corpus* issued from the proper courts of the United States.

8 *Cye.* 1088.

In re Ah Joy, 29 Fed. Rep. 181.

In re Lee Tong, 18 Fed Rep. 253.

Again, "due process of law" is defined as—

> "Law in the regular course of administration through courts of justice."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

Can it be solemnly argued that the arrest of these defendants in New York in a manner which operated to prevent their attendance at the trial in Washington was "in the regular course of administration through courts of justice?" If courts of justice were to be administered in this manner throughout the United States the conditions which would ensue are so apparent as to condemn the practice without argument. Citizens accused of crime would be of all men most miserable.

The effect of the arrest in New York was to prevent the trial in the Supreme Court of the District of Columbia from proceeding at the time fixed. The regular course of administration through courts of justice required due consideration for the rights of the defendants in whichever jurisdiction the trial was appointed to be held.

Again, we have "due process of law" defined as—

> "The application of law as it exists in the fair and regular course of administrative procedure."
>
> 8 *Cyc.* 1081.
>
> 2 *Kent's Commentaries* 10.

And this was the law of Blackstone, where it is held:

> "Jurors, suitors and witnesses in attendance in a court of record are privileged from arrest."
>
> 3 *Blackstone's Commentaries* 289.
>
> 3 *Cyc.* 274.

In a South Carolina case, *Sadler vs. Bay,* 5 Rich., S. C., 523, the defendant was arrested and summoned to appear at Chester; while on his way there he was arrested on the same cause of action and summoned to appear at York, the first suit having been discontinued without his knowledge. It was held that he was privileged from arrest. (See also a Michigan case.)

Baldwin vs. Branch, 48 Mich. 525, 12 N. W. 686, where it was held that where appearance bail had been accepted from one arrested on a criminal warrant issued by a justice he cannot, pending his release on bail, be arrested in a civil *capias* upon the same matter at the suit of the same complainant. In the case at bar the sovereign is the complainant in both jurisdictions.

In *Ponzi vs. Fessenden,* 258 U. S. 260 (opinion by Chief Justice Taft), this Court had occasion to comment upon the fact that a defendant accused of crime by the sovereign cannot be in two places at the same time and inferentially condemned the Government's practice in the case at bar.

The Court held:

> "One accused of crime has a right to a full and fair trial according to the law of the Government whose sovereignty he is alleged to have offended. * * * (he) 'cannot be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense.' "
>
> *Frank vs. Mangum,* 237 U. S. 308-341.
> *Lewis vs. U. S.,* 146 U. S. 370.
>
> "If that is accorded him, he cannot complain."

Benjamin W. Morse was, therefore, entitled to be present in Washington on the morning of the 6th day of February,

1923, when his case had been set for trial, and the action of the sovereign in subjecting him to a second arrest in New York constituted, not only a violation of his constitutional rights, but a clear interference with the proper functioning of the Washington Court.

In *King vs. Orr,* 5 U. C. Q. B. O. S. 724, it is held:

> "When a justice takes bail for an appearance at a fixed time, a second arrest by complainant for the same charge before the time appointed is illegal."

The rule in civil cases has always been:

> "Parties to civil actions while in actual attendance upon the courts, and while going to and returning from the courts, are exempt from arrest under civil process."

2.

THE SECOND ARREST OF APPELLANT UPON THE SAME BENCH WARRANT WHICH HAD BEEN USED AS THE BASIS OF THE REMOVAL PROCEEDING IN MASSACHUSETTS WAS ILLEGAL, AS THE BENCH WARRANT HAD SPENT ITS FORCE; WAS *functus officio,* AND THE DISCHARGE IN MASSACHUSETTS OPERATED LEGALLY TO DISCHARGE THE APPELLANT FROM ANY FURTHER CONFINEMENT OR PROCEDURE UNDER THAT PARTICULAR PROCESS.

The bench warrant was originally issued by the District Court in New York on July 19, 1922 (fols. 49-50). It was sent to the United States Attorney in Massachusetts and made the basis of removal proceedings in that State (fols. 10-11).

On February 5, 1923, appellant was subjected, while passing through New York, to an arrest upon the *same bench*

warrant which had been previously used in the removal proceedings in Massachusetts (fols. 10-11).

This was an improper and oppressive use of the Court's process.

In *Ex parte George Milburn*, 34 U. S. (9 Peters) 704, Judge Story wrote:

> "A discharge of a party under a writ of *habeas corpus* from the process under which he is imprisoned discharges him from any further confinement under the proceeding; but not under any other process which may be issued against him under the same indictment."

A different question might be presented if a new bench warrant had been issued by the District Court in New York upon application duly made by the United States Attorney. But here we have the same process functioning in two jurisdictions and the appellant subjected to a second confinement when propriety of the first confinement was still under judicial consideration by the Commissioner.

A rearrest without any warrant or process is entirely unwarranted. If such a proceeding were tolerated, the writ of *habeas corpus* would be of no avail.

Matter of Titton, 76 Howard Prac. (N. Y.) 303.

An order of discharge other than for technical or cureable defects terminates the pending proceeding so that the person discharged cannot be further restrained thereunder or again arrested or held in custody unless a new prosecution is instituted.

In re Crandall, 59 Kansas 671.

State vs. Holm, 37 Minn. 405.

After a person has been admitted to bail, an officer has no right to rearrest him under the same process.

5 *Corpus Juris*, 437.

To authorize a rearrest, a new warrant should be issued.

Sherman vs. State, 2 Ga. A. 686, 58 S. E. 1122.

> "When a party was in attendance before the district court of a county in which the crime charged was alleged to have been committed, in compliance with prior regular proceedings by which he was held by a committing magistrate to await the action of the grand jury, and before the grand jury had acted on his case or been discharged, he was again arrested on a charge of the commission of the same offense, the Court held the second arrest to be illegal."
>
> *State vs. Riley*, 109 Minn. 437, 124 N. W. 13.

> "When a justice takes bail for appearance at a fixed time, a second arrest by the same complainant, for the same charge, before the time appointed is illegal."
>
> *King vs. Orr*, 5 U. C. Q. B. O. S. 724.

In those cases where a second arrest has been tolerated, there has uniformly been a "new proceeding" with "new process" after discharge on the first proceeding.

In re White, 45 Fed. R. 237.

In re Collins vs. Loisel, 262 U. S. 430, there was a "new proceeding" with new affidavits after a previous discharge.

See also *Sutton vs. Butler*, 74 Misc. 251.

Hinds vs. Parker, 11 App. Div. 327.

3.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA HAD EXCLUSIVE JURISDICTION OF THE FERSON OF THE DEFENDANT BECAUSE:

1. IT HAD FIRST ACQUIRED JURISDICTION AND ADMITTED THE APPELLANT TO BAIL.

2. IT HAD NOT GIVEN CONSENT TO AN ARREST IN NEW YORK OR TO AN INTERFERENCE WITH ITS DATE FIXED FOR TRIAL.

3. THE WASHINGTON JURISDICTION HAD NOT BEEN EXHAUSTED.

The defendant having been first arrested in the District of Columbia and there admitted to bail, was legally under the exclusive control and jurisdiction of that Court, and of his bondsman.

In *Ex parte Johnson,* 167 U. S. 120, this rule is well laid down and fully discussed. The opinion is by Justice Brown who held that if the United States Court for the Eastern District of Texas:

> "Had acquired jurisdiction it was entitled to try the defendant,"

and

> "In this connection jurisdiction of the 'case' that is the crime, is indistinguishable from jurisdiction of the person who is charged with the crime. We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between Federal and State Courts should not determine this question. Ever since the case of Ableman vs. Booth, 21 How. 506, it has been the settled doctrine of this Court that a

Court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted and that no other Court has the right to acquire such custody or possession."

15 *Corpus Juris,* 1166;
Chandler vs. Sherman, 162 Fed. 19;
Daret vs. Duncan, 4 Fed. Cases No. 581;
Sadlier vs. Fallen, 21 Fed. Cases No. 12209;
Peo. vs. Sage, 11 A. D. 4.

In *U. S. vs. Marrin,* 227 Fed. Rep., 314, 318, the Court said:

"If a person be answerable to two different jurisdictions for offenses against the laws of each it is a physical fact that he cannot be at the same time in the control of each. It is, therefore, necessary that one give way to the other for the time being. It is convenient and desirable that there be a rule by which it can be determined which authority shall make way for the other. This rule is that known as the rule of comity. It answers with Courts and cabinets, in law and in diplomacy substantially the same purpose which personal courtesies serve in the social relations of life. *One of the principles is that the court which first asserted jurisdiction may continue its assertion without interference from the other.*"

The Washington Court having been the Court in which the defendant was first indicted and in which he was first admitted to bail, had exclusive jurisdiction at the time of the second illegal arrest in New York to proceed to trial on February 6, 1923, the time appointed, without interference from the representative of the sovereign in New York—the

United States Attorney for the Southern District of New York.

> "The tribunal which first gets jurisdiction holds it to the exclusion of the others until its duty is fully performed and the jurisdiction invoked is exhausted; and the same rule applies alike in both civil and criminal causes. The removal of a person by a court of competent jurisdiction beyond the control of his bondsmen, thus rendering them unable to produce the person at the time and place set for trial as undertaken by the condition of his bond, is in the language of the authorities 'an act of law' and can be set up in defense to a suit on the bond."
>
> *In re James,* 18 Fed. Rep. 853.

> "A court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined; and a person arrested on a Commissioner's warrant and either in custody or held to bail pending his examination for removal to another district in answer to a criminal charge *is not subject to a second arrest* for removal to a different district until the first proceeding has been terminated."
>
> *In re Beavers,* 125 Fed. Rep. 988.

See, also,

Ponzi vs. Fessenden, 258 U. S. at p. 260.
Covell vs. Heyman, 111 U. S. 176.
McCauley vs. McCauley, 202 Fed. R. 280-284.
State vs. Chimault, 55 Kans. 326.
Ex parte Earley, 3 Ohio Dec. 105.
Commonwealth vs. Fuller, 8 Metc. 318.
Hill Mnfg. Co. vs. Providence & N. Y. S. S. Co., 113 Mass. 495.
Ayers vs. Farrell, 196 Mass. 350.

Wayman vs. Southard, 10 Wheat. 1.
Taylor vs. Taintor, 16 Wall. 366.
Felte vs. Murphy, 201 U. S. 123.
Harkvader vs. Wadley, 172 U. S. 163.
In re Johnson, 167 U. S. 120.
Opinion of the Justices, 201 Mass. 607.

In the case at bar the United States is "the common sovereign" and also "the common accuser." The Washington Court which first acquired jurisdiction had never given consent to arrest in the Southern District of New York; nor is any consent shown in the moving papers so that the arrest in the Southern District of New York created a condition which necessarily conflicted with and disturbed the due administration of justice in the Washington Courts. This was referred to by Judge Brandeis in *Stallings vs. Splain,* 253 U. S. 342, where he says:

> "The question would merely have been whether a second arrest properly could be made when it conflicted with the first."

By the arrest in New York the defendant was deprived of his Constitutional rights to a speedy trial in the District of Columbia, and by the same sovereign.

Beavers vs. Haubert, 198 U. S. 85.

The sovereignty of the United States had first attached its jurisdiction in Washington and had not been asked to yield it.

In *Peckham vs. Henkel,* 216 U. S. 482, it is held:

> "The present case differs upon this point from that of Beavers *vs.* Haubert, in that *the consent of the court of prior jurisdiction* was not obtained as in that.

> In that case the court reversed the question as to 'whether the Government had the right of election *without such consent*' to proceed in either of two districts in which indictments were pending."

In extradition cases there is immunity from a second arrest.

In re Baruch, 41 Fed. Rep. 472.

4.

THE DEFENDANT HAVING BEEN ADMITTED TO BAIL IN WASHINGTON WAS ALSO LEGALLY IN THE CUSTODY OF HIS BONDSMAN AS HE PASSED THROUGH NEW YORK ON THE SLEEPING CAR AND WAS IN A LEGAL SENSE AS MUCH UNDER ARREST AS IF ACTUALLY CONFINED.

The general rule is as stated by Mr. Justice Wayne in *Taylor vs. Taintor,* 16 Wall. 371—a leading case.

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of his original imprisonment."

See, also, *Beavers,* 125 Fed. 988, affirmed 194 U. S. 73.

A person while held to bail in one court is not subject to arrest under an indictment in another court, particularly without the consent of the first Court.

(Same cases as last above cited) and also:

Hernandez vs. Camobell, 11 N. Y. Superior Court, 642.

10 *Howard's Practice,* 433.

5.

THE ARREST IN NEW YORK CONFLICTED WITH THE WASHINGTON JURISDICTION AND VIOLATED THE PRINCIPLE OF JUDICIAL COMITY.

The case in Washington before Mr. Justice Stafford could not proceed unless the defendant was personally present; and he could not be present because on the very midnight before his trial he was arrested and detained by the United States, the common accuser, in the Southern District of New York. This was wholly subversive of the principle of judicial comity, which is defined as:

> "The principle in accordance with which the course of one State or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."
>
> *Mast vs. Stover Mnfg. Co.,* 177 U. S. 485.

Had the Supreme Court in the District of Columbia been requested to consent to the arrest in New York a different state of facts would be here presented.

250 U. S. 283:

> "Comity * * * is not a rule of law but a rule of practice, convenience, and expediency."
>
> *Watts vs. Unione Austriaca di Navigazione,* 224 Fed.

In the *Marrin case,* 227 Fed. Rep. at page 317, it is held:

> "It is too clear for necessity of citing supporting authorities that any court has the power to assert its jurisdiction and in the legal sense preserve its dignity

> by preventing the interference of any other authority with the work which that court had in hand to do."
>
> *"In the enforcement of this principle courts will relieve from arrest and even* from the service of civil process on witnesses who are in attendance upon the business of the court. In recognition of the same principle no court will direct the services of its process upon persons who are thus in attendance upon another court."

This Court will observe the application of the facts of the case at bar as applied to the rule of law above laid down. The defendant being actually in the custody of his bondsman in the Washington jurisdiction was actually in that jurisdiction, in the legal sense, and being *en route* to his trial was not subject to a second arrest in the Southern District of New York, particularly upon a bench warrant upon which removal to New York had been denied. In recognition and enforcement of the great principle of judicial comity, and in order to preserve the due and orderly administration of justice and the application of the Constitutional right of due process of law, the District Court should have relieved from the wholly arbitrary and illegal second arrest by vacating the same upon the appellant's application by *habeas corpus*.

This is not a case where a defendant was unlawfully abducted or kidnapped, from one State, or one jurisdiction, to another, or where he is fraudulently brought into the jurisdiction, or where he has voluntarily come into the jurisdiction; it is a case of a defendant duly admitted to bail in another jurisdiction and *en route* to his trial, being arrested upon an old bench warrant at a time when removal proceedings against him were pending undischarged.

"Where the accused has been arrested with a view to extradition, a second warrant for his arrest cannot be executed while *habeas corpus* proceedings are pending."

In re Farez, 8 F. Cas. No. 4644, 7 Blatchf. 34.

It is submitted that the facts of this case are wholly different from any case recorded in the books. There is no precedent anywhere which would authorize or justify the second arrest which the Federal authorities perpetrated in the Southern District of New York upon this petitioner in the arbitrary, high-handed and wholly illegal manner disclosed by this record.

This case stands wholly by itself as a concrete example of the oppressive tactics of certain Government officials and the arbitrary exercise of the great power of the United States contrary to the due process clause of the Constitution and to all of the great legal principles sanctioned by the Courts for the protection of the citizen and the orderly and dignified administration of justice. It was an entire disregard of the decision of Judge Thomas and of the order of Judge Stafford that the trial in his Court should proceed on the day fixed by him, and of all of the principles of due process of law and judicial comity.

6.

IN THE CONSIDERATION OF HIS APPLICATION FOR DISCHARGE BY HABEAS CORPUS, BENJAMIN W. MORSE, WHILE NOT A PARTY THERETO, WAS ENTITLED TO THE FULL BENEFIT OF THE DECISION OF JUDGE THOMAS IN THE CASE OF HARRY F. MORSE AS THE SAME INDICTMENT WAS INVOLVED. SUCH DECISION WAS NOT RES ADJUDICATA OF ALL ISSUES OF LAW AND FACT NECESSARILY INVOLVED IN THE RESULT AND SHOULD NOT HAVE BEEN ARBITRARILY DISREGARDED BY THE GOVERNMENT.

One of the questions "necessarily involved" in Judge Thomas' decision was that the bench warrant issued in New York and in connection with appellant's arrest in removal proceedings was illegally issued. This holding the Government officials set at naught and wholly defied by using the same bench warrant for a second arrest and subjecting appellant to a "second confinement" thereunder.

The Government had instituted removal proceedings in Connecticut against Harry F. Morse, and such proceedings were had in that jurisdiction that Judge Thomas held that the indictment in the Southern District of New York upon which the arrest was made did not charge the defendants with the commission of a Federal offense. The opinion of Judge Thomas is printed in the record (Fols. 33-49) herein and is referred to for the full detail of the conclusions there reached.

It is submitted that the question of whether the indictment charged an offense under Federal laws was a *question of substantive law*, and where a matter is decided as one of substantive law it is conclusive upon the Government until

reversed upon appeal. There was no technicality involved in the decision of Judge Thomas. It was a broad holding that the New York indictment charged no offense whatsoever.

It must be admitted that the legal sufficiency of the indictment raised a question of substantive law, and this question was submitted to Judge Thomas both by the defendant Harry F. Morse and by the Government, argued at length, and briefs submitted. Judge Thomas held that the indictment was bad, that it did not charge the commission of a Federal offense, and discharged the defendant Harry F. Morse. This then became the law of the case until reversed on appeal. It could not be arbitrarily disregarded by the Government, as it was in the instant case by a second arrest in New York.

The arrest in New York not only violated the principle of judicial comity, as related to the Washington jurisdiction, but also wholly violated, disregarded and set for naught the decision of Judge Thomas in the Connecticut jurisdiction.

Every principle of due process of law and regard for the proper forms of orderly procedure requires that the decision of Judge Thomas should stand as the controlling law of the case until reversed. The decision of a Federal judge having jurisdiction of the subject-matter and the person of a defendant, that the indictment did not charge an offense under Federal laws is, we submit, just as much a decision upon the merits of that phase of the controversy as in the *Oppenheimer case,* 242 U. S. 85, wherein Judge Holmes wrote:

> "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one; but a judg-

> ment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another."

Even the decision of a United States Commissioner, while not given the dignity of res-judicata has been held to be conclusive. It is held in

U. S. vs. Hoa, 167 Fed. Rep. 211

that:

> "The decision of the United States Commissioner refusing to commit a prisoner for removal to another Federal district for trial of a criminal charge does not render the question of the right to such removal *res judicata,* but ordinarily in the absence of special circumstances *it should be held conclusive on the same facts."*

See also:

Palmer vs. Thompson, 20 App. D. C. 273; 29 *Corpus Juris* 178.
Palmer vs. Colladay, 18 App. D. C. 428.
Targun vs. Bean, 109 Me. 189.
McConologues Case, 107 Mass. 154.
Exparte Hamilton, 65 Miss. 98.
Exparte Jilz, 64 Mo. 205.
Yates vs. People, 6 Johns 337.
In re Crow, 60 Wis. 349.

In *Horn vs. Mitchell,* 223 Fed. Rep., 550, it is held that:

> "When an order is made by a judicial officer of one Federal district having authority to act for the removal of a person arrested in that district to another where he is charged with crime, and the order is reg-

> ular on its face and was based on proceedings of which the Court had jurisdiction it may not be reviewed by the Court in the latter district in *habeas corpus* proceedings."

An order of judgment discharging a person in *habeas corpus* proceedings is conclusive in his favor that he is illegally held in custody and is *res judicata* of all issues of law and fact necessarily involved in that result.

Judge Thomas concededly had jurisdiction of the person of the defendant Harry F. Morse; he had jurisdiction of the case; and the Government submitted its rights when it asked Judge Thomas to issue a warrant of removal to the Southern District of New York.

In the *habeas corpus* proceeding before Judge Winslow based upon the second arrest, Judge Winslow was in effect asked by the Government to review, or sit in appeal upon, the decision of Judge Thomas, and not to give it any effect whatsoever. If Judge Thomas was right and the indictment here does not charge an offense, then the defendant ought not to have been held in any event. Could Judge Winslow say upon the argument before him that the decision of Judge Thomas was wrong; or should the decision upon that matter in the orderly course of judicial procedure have been left to the Circuit Court of Appeals upon appeal by the Government?

Was Judge Winslow authorized to wholly disregard the decision of a District Judge of concurrent authority and jurisdiction upon a question of law and arbitrarily set it aside, or should it have been held that due process of law required the Government to appeal from the decision of Judge Thomas and that until reversed upon appeal such decision was the law of this case?

> "When an order is made in one federal district, by a judicial officer having authority to act, for the removal of a person arrested in that district to another when he is charged with crime, such order, if regular on its face, and based on proceedings of which the Court has jurisdiction, will not be reviewed on *habeas corpus* in the second district."
>
> *Horn vs. Mitchell,* 223 Fed. R. 549; aff. 232 Fed. R. 879.
>
> *U. S. vs. Robinson,* 126 Fed. R. 1016.

Every principle of judicial comity and due process of law required that this second arrest should have been vacated and the Government remitted to its right to appeal from the decision of Judge Thomas in the Connecticut District.

See also:

Williams vs. State, 83 S. K. 790; 169 Ind. 384;

U. S. vs. Chungshee, 71 Fed. Rep. 279.

Freeman on Judgments, Section 324, sustains this view in the following language:

> "If, on the other hand, the prisoner is discharged from custody this is an adjudication that at that time he was entitled to his liberty and is conclusive in his favor should he be again arrested unless some authority can be shown for holding him which did not exist at the time of his discharge."

And in *Church on Habeas Corpus,* Section 386, I find:

> "Again it has been held that in proceedings upon *habeas corpus* the determination of the Court upon the facts has the effect of a verdict of a jury."
>
> *Bennett vs. Bennett,* 61 Iowa 199; 16 N. W. 91.

Indeed, the authorities, without exception, seem to hold that when a person has been discharged upon *habeas corpus* all issues of law and fact necessarily involved are *res judicata* and the person so discharged cannot for the same cause be "lawfully rearrested" upon the same process. Such in effect was the ruling of this Court in *Collins vs. Loisel,* 262 U. S. 430.

In the Connecticut proceeding all of the facts before the Commissioner, together with the indictment, were before Judge Thomas upon the question of probable cause and the decision of Judge Thomas found that upon these facts the allegations of the indictment could not be sustained; and that the indictment is defective as matter of law.

We submit that this decision should have a conclusive effect until reversed. See also:

Sutton vs. Butler, 74 Misc. 251; 76 Fed. Rep. 951; 133 N. Y. Supp. 936; 66 A. D. 327; 42 N. Y. Supp. 955.

Hinds vs. Parker, 11 A. D. 327.

These cases last cited hold in substance that:

> "A person discharged from custody on *habeas corpus* may not lawfully be arrested again for the same cause."
>
> "An order discharging a person in *habeas corpus* proceedings made by a court possessing jurisdiction has a binding force and effect upon all parties concerned."

7.

THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN SUSTAINED, THE ARREST OF THE DEFENDANT VACATED, AND THE DEFENDANT DISCHARGED.

A summary of the facts and law of this case will disclose the very unusual situation presented to the Court for decision. If the position of the Government is sustained this Court is asked to hold that a defendant in a criminal suit with a removal proceeding actually pending undetermined discharged in one jurisdiction and in the custody of his bondsman and also in the custody of his bondsman for appearance in another Federal jurisdiction for trial and actually necessarily *en route* to that latter jurisdiction for trial in accordance with the order of the Court, may be summarily detained in the jurisdiction to which the Government is at the time seeking his removal upon an indictment which had been judicially held not to charge a criminal offense—all, we submit, in violation of every principle of judicial comity, in violation of the right of the Washington bondsman to produce the appellant before the Court for trial, and in violation of the orderly and due processes of the law, and of the basic principles of fairness in the administration of justice. This Court is dealing with the actions of the representatives of the Federal Government which Government in the instant case is both sovereign and accuser, with one hand pulling the defendant into the Washington court for trial and with the other hand forcibly holding him in New York, so that he could not appear in Washington. An anomolous and wholly unusual situation is here created which it is not believed that

this Court will sanction. The decision of Judge Thomas should have been held conclusive upon the same process until reviewed and reversed upon appeal and the Court of Judge Stafford in the District of Columbia should have been accorded full respect by the representatives of the Federal Government.

The facts set out in the petition and supplementary affidavits of the appellant were not denied, and it is respectfully submitted that the writ of *habeas corpus* should have been sustained and the defendant discharged from custody.

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DECEMBER 1, 1924.